IN THE COURT OF APPEALS FIFTH DISTRICT OFTEXAS AT DALLAS

05-21-00360-CV

On Appeal from the 366th Judicial District Court Collin County, Texas
Trial Court Cause Nos. 366-53554-2020, 366-51795-2021, and 366-50778-2021

APPELLANT'S REPLY BRIEF

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Case References

SUMMARY OF ARGUMENT

TO THE HONORABLE JUSTICES OF THE 5TH COURT OF APPEALS,

This is a case of severe post-separation abuse in which the vexatious litigant designation, a legislative tool intended to prevent abuse, was weaponized to perpetuate abuse. The overwhelming presence of unethical and even criminal misconduct is ever-present in this case and the associated cases presently before this Court. While the resulting devastation is irreparable and truly incomprehensible, the records before this court offer a window to the due process violations that brought about the undeniable injustice that has robbed my young children, MCM and MAM, of far too much of their childhood happiness and innocence.

Appellee failed to establish any state interest that could justify the devastating consequences that the Tex. Civ. Pac. & Rem. Code, Chapter 11 regulations can impose on the interest of the public when, along with its discriminatory and prejudicial impact, it infringes on our most precious and fundamental constitutional rights: parental rights, children's rights, equal protection rights, and first amendment rights to free speech and to access our courts. Additionally, there is simply no possible argument for the unconstitutionally vague 'federal-1983-suit-waiting-to-happen' that can subject a mother and her children to an extensive and indefinite period of trauma and emotional and psychological abuse as it has herein causes 05-21-00242-CV, 05-21-00373-CV, and 05-21-00360-CV. Appellee did seem to

insinuate that I did not point to specific enough authorities, so my response is indented to bring clarification.

> [MS. WILKERSON: Are we looking at all of the case filings because the vexatious litigant filing isn't a cause number of its own, is it? Because I have -- I have a whole binder of their filings. And actually this is just the first three months of their filings. This is the 17th hearing I've been to since August at their request.]
> (RR Sup. 1, P. 7, Lines 7-13).

> THE COURT: What do you mean relevant?
> MS. WILKERSON: It was necessary for me to seek a protective order. They're saying it's vexatious therefore without merit, right? So none of my allegations were baseless. The one on January 14th, I filed to strike that one because an attorney recommended that I just focus on the continuance issue. I mean, that one wasn't litigated. The recent one, 45-2021, I was trying to move out of the home on April 1st and Respondent kept driving by the home. And even on 333 when orders were entered, he admitted to approaching me and my daughter with a gun. I have from August the police report that I picked up yesterday. I've been harassed. I've been stalked. I have -- his mom is looking at a felony charge for a recording device for wiretap.
> THE COURT: Ms. Wilkerson, please stay seated.
> MS. WILKERSON: Yes, sir. So as far as evidence for the protective orders that I request, the initial ones for the abusive situation that I had left and have just been trying to get away from, which he continues to -- I don't even know that a protective order would matter because he will continue to harass me through litigation when he, in fact, claims that I'm the one harassing him through litigation. Their final orders leave conditions precedent that make it impossible for me to have visitation with my children. So I have text messages and I have -- I have e-mails from my first attorney that said that they were harassing her. That she actually had to threaten Mr. Mallers saying that she would request to sanction him if he did not stop. They ran up my legal fees $43,000 in three months in harassment. This is harassment in itself. I have a report, a police report.

> THE COURT: When you say "this is harassment," what are you referring to, the judicial process?]
> (RR Sup. 1, Vol. 006, P. 7, Line 11 – P. 12, Line 20).

STRUCTUAL ERRORS

1. Multitude of Errors. As stated in my April 22, 2022, *Amended Brief*, (see Exhibit A), structural errors permeate the underlying case at issue, and this "associated case" is not immune from such defects as ineffective assistance of counsel, fraud, and lack of impartial trial court judge. "These appellate causes are underscored with constitutional-structural errors which have broad effects that not only reach forward to the outcome, but backward to the foundation of the case and inward (to its structure)." (Arizona v. Fulminante, 499 U.S. 279, 309–310). "Structural" errors, as explained in Arizona v. Fulminante, is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."

> MS. WILKERSON: Well, it's their claim to vexatious litigation and the fact that they present lies to a tribunal. If you look at the finding of facts and conclusions of law that they present and continue to harass the Dallas prosecutor with to prosecute me based on lies.
> THE COURT: Do you recognize, Ms. Wilkerson, that I signed those the findings of fact and conclusions of laws? I actually did go through it and draft it.
> MS. WILKERSON: Well, I mean, that's not what Gracen sent me. But --
> THE COURT: So are you now calling me a
> lair?

P. 12, Line 21 – P. 13, Line 9.

2. Dirt and Worms. The vexatious litigant statute was used as a *CYA* strategy when Appellee, *Mark*, realized that Appellant, *myself*, was not the typical defenseless pro se litigant. I would not stop fighting back, and the fact that I had to defend myself against his vexatious litigation makes him a vexatious litigant, not me. Mark argues that my argument regarding his unclean hands lacked citations to authorities, but the facts are obvious on face. Mark's hands, feet, arms, and face were completely covered in filth because he plays in the dirt with worms. Mark, Claire James, and George Mallers wormed their way into a hole with their misconduct throughout their countless trial court proceedings, and the day after this Court accepted the underlying case on appeal, April 12, 2021, they slithered deeper into their abyss of abuse when they demanded my designation as one of roughly 350 Texas Vexatious Litigants. *See Notice of Appeal*, CR1, P. 1570. Interestingly, other than filing for divorce by-and-through an attorney on June 30, 2020, I have never sued anyone in my life. The sad reality here is that Mark's trial court attorneys thought their Bar Cards were more important than the welfare of two babies. They are incorrect, and their plan to keep this Court from reviewing these cases was denied when their requests for a prefiling bond was denied -repeatedly. (*See Respondent's Motion to Clarify or Reconsider Ruling Declaring Petitioner a Vexatious*, CR3, P. 53).

> [MS. JAMES: Your Honor, I would like to, as quickly as I can, offer some evidence just for our appellate record if I could, Your Honor?
> THE COURT: In regards to?
> MS. JAMES: In regards to the motion for a declaration that Ms. Wilkerson is a vexatious litigant.
> THE COURT: The Court will take notice of the filing as it were. And with regard to the evidence on the specific filings that have been denied, I think the Court can take judicial notice of that. All of the other issues in regards to the e-mails and the behavior that is already contained within the Court's orders in regards to the findings of fact and conclusion of law are also taken judicial notice of.]
> (P. 56, Line 21 – P. 57, Line 10.)

3. Bias. Throughout the April 20, 2021 PO/vexatious litigant hearing, impartiality is clearly at issue when the trial court continues to adhere to Mark's baseless, biasing claims stated in two different ex parte requests to change conservatorship from prior proceedings. -Caperton v. A.T. Massey Coal Co., (2009) (quoting In re Murchison, 349 U.S. 133, 137 (1955)): "The United States Supreme Court has concluded that "a fair trial in a fair tribunal is a basic requirement of due process." The trial court's consistent admonishments regarding my inability to follow rules echoes the defamatory and biasing impact of Mark's ex parte pleadings, and the prejudice undoubtably caused the rendition of improper judgements. (See RR Sup. 1, Vol. 006, P. 15, Lines 9-15).

> [Again, I'm going to go back to what I told you before, I recognize that you're upset at the situation you find yourself in. I recognize

that you don't feel like the Court has been ruling in your favor. And I will agree with you, the Court has not been ruling in your favor. The Court has been ruling against you. At each and every single time you've come before this Court to request something, you have lost.]
43, 5-12.

[MS. WILKERSON: No, Your Honor. I have a right to see my children.
THE COURT: See, again, there -- where -- where we're running on the issue here, you don't necessary have a right if you can't follow the orders of the Court.
MS. WILKERSON: I can.
THE COURT: And so that's where the issue comes in.
MS. WILKERSON: I can follow your orders, sir.
THE COURT: Again, evidence has proven otherwise. So the Court put in specific restrictions and specific requests. And, yes, I will grant you, most of those requests came from the other side, but that's because you kept having issues with following the Court's orders and I have no other option at that point then to follow the things that they want.]
(RR Sup. 1, Vol. 006, P. 53, Lines 6-23).

4. Ineffective Assistance of Counsel. Furthermore, a fair setting would have required appointment of counsel; otherwise, how could I have been expected to understand the law or even electronic filing procedures? This knowledge is not innate.

[MS. WILKERSON: To avoid frustrating you further, sir, what is the procedural -- what's the process you would like me to present evidence?
THE COURT: The normal way that we have presented evidence and the way that you have presented evidence in the past, Ms. Wilkerson. So, again, don't act as though you do not understand

how that works because you've been through this and you've already been able to present evidence at multiple hearings.
MS. WILKERSON: I've never been able to actually present evidence.
THE COURT: Oh, you didn't like the evidence that I excluded and **you didn't like what things that we have to follow in regards to the rules.** So you have been able to present evidence because you have called witnesses and you have presented documentary evidence that was admitted into this Court. So don't say you haven't been because **that would be a lie**. So, again, what evidence do you have that is different and apart --
MS. WILKERSON: I don't understand the process.
THE COURT: **Then maybe you should have gotten a lawyer**.
MS. WILKERSON: I did. I spent $43,000 and I was denied an estate that I put my 14 years into. I was denied any access. And I have evidence and I'm asking how you want me to present, Your Honor.
THE COURT: And I'm asking you to present it the proper way. Again, you are representing yourself. You've done that before. We can move forward with it. So do you have evidence you wish to present at this point in time in regards to your protective order?
MS. WILKERSON: Yes, I do.
THE COURT: All right.
MS. WILKERSON: This is from October 10th of 2015. It's a police report. Mr. Maldonado --
THE COURT: Ma'am, are you reading from the police report?
MS. WILKERSON: No, sir.
THE COURT: Then what are you doing?
MS. WILKERSON: Shall I approach the bench?
THE COURT: In regards to what?
MS. WILKERSON: The evidence.
THE COURT: What evidence?
MS. WILKERSON: My police report, sir.
THE COURT: All right. Have you tendered it to opposing counsel?
MS. WILKERSON: They've seen it, yes.
THE COURT: That's not what I asked.]
(RR Sup. 1, Vol. 006, P. 16, Line 1 – P. 17, Line 25).

[Q. Sir, there's been e-mail communication regarding a lawyer that you hired. Do you have legal representation?
A. I thought I had one and I've talked to a bunch and **no one will get near the case because of the mess that has been created by opposing counsel**. So I'm left here today where I stand. And I have money for a attorney but no one will come near it because of how muddy and messy this is.
Q. So you think that me and my colleagues have done things we shouldn't have done, right?
A. I think everybody has.
Q. And you think that this hasn't been a fair process?
A. **Three attorneys against one pro se litigant, I don't think it is.**]
(RR Sup. 1, Vol. 006, P. 36, Lines 9-24).

MS. JAMES: I'm sorry, Your Honor, just as an administrative matter, I would request that Mr. Wilkerson sit in the gallery as he is not an attorney or a party.
……

THE COURT: All right. Mr. Wilkerson, unless you have a reason to be sitting up here as an attorney or as a party to this case, then we're going to ask you to retire back to the gallery. Thank you.
8, 24 – 9, 11.

A. **It has everything to do with monetary situation.**
Q. It has nothing to do with family violence, does it?
A. No.
Q. It has no bearing on whether or not family violence has occurred, correct?
A. It's what you can prove and if you don't have money to prove or justify your situation --
37, 2-19.

THE COURT: All right. Ms. Wilkerson, I'm going to cut you off because I don't feel we're getting anywhere and this is a **waste of time**. All right?
43, 2-4

> WILKERSON: Your Honor, I have --
> THE COURT: Stop talking and interrupting me when I am talking. Your motions are denied. Your protective orders, which have previously been denied, are made final today. All right? I don't even think we need to get into argument as to the vexatious litigant point because every single time, again, Ms. Wilkerson, you have come to this court with frivolous motions, specific lies in the files that you have placed within this court, and I'm declaring you to be a vexatious litigant, which will require you to get permission from the -- a presiding judge to file anything else --
> MS. WILKERSON: You haven't given me a hearing on that and I'm --
> THE COURT: Okay. I have a hearing.
> MS. WILKERSON: **-- listening to you tear me apart.**
> (46, 1-17).

UNCONSTITUTIONAL AF

5. **UnDue Process**. Mark makes the laughable argument that "*This case is not an appropriate vehicle for the Court to take on the issue of constitutionality of the statute, because Ms. Wilkerson already has had multiple opportunities to assert her due process rights."* Assuming without deciding that I received due process of law when I was stripped of my property rights and parental rights, deemed a meth-head by default, exposed to criminal liability, and then mocked, retaliated against, and publicly shamed for requesting a protective order, Mark argues against my present and future rights to due process. I am pro se, so correct me if I'm wrong, but due process is not a one-time thing, right? Mark's argument here, that I was already afforded due process demonstrates his desire to continue to exercise control over me. Mark's argument also implies that I was only arguing for my constitutional due

process rights when in fact I am more concerned with my freedom of speech and right to access the courts under the 1st Amendment of the United States Constitution. I am also aware that the right to access the courts does not include "the right to file vexatious litigation;" however, in the State of Texas, there is an added layer of protection provided by the Texas Constitution for prior restraints.

6. Prior Restraint. The Vexatious Litigant Designation constitutes an impermissible prior restraint on speech under the Texas Constitution. "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press." TEX. CONST. art. I, § 8. Enshrined in Texas law since 1836, this fundamental right recognizes the "transcendent importance of such freedom to the search for truth, the maintenance of democratic institutions, and the happiness of individual men." TEX.CONST. art. I, § 8 interp. commentary (West 2007). Commensurate with the respect Texas affords this right is its skepticism toward restraining speech. While abuse of the right to speak subjects a speaker to proper penalties, we have long held that "pre-speech sanctions" are presumptively unconstitutional. Davenport v. Garcia, 834 S.W.2d 4, 9 (Tex. 1992); see also Ex parte Tucker, 220 S.W. 75, 76 (Tex. 1920). The First Amendment of the U.S. Constitution is similarly suspicious of prior restraints, which include judicial orders "forbidding certain communications" that are "issued in advance of the time that

such communications are to occur." Alexander v. United States, 509 U.S. 544, 550 (1993) (citation and internal quotation marks omitted). The U.S. Supreme Court has long recognized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); see also id. ("If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."

7. Unconstitutional as Applied. The vexatious litigant statute is unconstitutional in my case because it serves to keep me from exercising the free speech and access to courts immediately necessary to protect my parental rights. Mark's brief fails to adequately address my argument regarding the constitutionality of the vexatious litigant statue as applied in this case and other cases arising under family code. Mark specifically references cases that have absolutely nothing to do with parental rights, protective orders, or any other sort of situation arising under Tex. Fam. Code. See Mark's case references: Beasley, 2020 WL 20 5087824 at *12; Drake, 294 S.W.2d at 373, Drum, 299 S.W.3d at 364-65; Dolenz, 2009 WL 4283106 at *3-4; and Retzlaff, 356 S.W.3d at 702. I argued that cases involving parental rights are intended to be relitigated as are protective orders see Tex. Civ. Prac. & Rem. Code § 11.054 where in all cases under the vexatious litigant statute the defendant must show "that there is not a

reasonable probability that the plaintiff will prevail in the litigation against the defendant," yet cases involving parental rights and protective orders are meant to be relitigated because the best interest of a child changes with family circumstances, protective orders afford a one-year review, and both allow for modification of provisions. It is asinine to speculate that "Molly Wilkerson will never prevail in litigation against Mark Maldonado," because there is no crystal ball that can predict Mark's future ability to terrorize me and further psychologically damage MCM and MAM through his vexatious litigation tactics. Even the trial court agreed with the logic of this argument when it sustained Mark's objection as to Molly's questioning of whether or not Mark would commit future family violence:

> [Q. (BY MS. WILKERSON) Do you think it's likely for Mark to commit family violence against me in the future?
> MS. JAMES: Objection; calls for speculation.
> THE COURT: Sustained.]

The vexatious litigant statute is facially unconstitutional because it infringes on the precious, fundamental constitutional right to freedom of speech and the right to petition, and at minimum the statute's use in cases arising from family code should be abolished. When a statute is intended to infringe upon access to the courts, the underlying cause of litigation must be a consideration. In this case, the underlying cause is the de facto termination of my parental rights. See Illinois State Bar Association, 389 U.S. 217 (1967), where broad rules framed to protect the public

and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms." The intended operation of the vexatious litigant statute is to curb potential negative impacts of litigants designated as "vexatious litigants" in accordance with statutory guidelines. The reality however is that there are other means of curbing frivolous litigation other than depriving citizens of fundamental constitutional rights; therefore, the vexatious litigant statute is not narrowly tailored. In fact, when the vexatious litigant statute was enacted in 1997, an authentic need was never identified as required under strict scrutiny analyses, just discussed.[1] Without identifying any actual state interest that can justify fundamental constitutional rights restrictions at the time of enactment, and because there is no greater interest than parental rights, the state cannot possibly establish an interest high enough to even begin to compare with the personal interest for which the law has deprived me.

8. Unconstitutionally Vague. The vexatious litigant designation was used as punishment in this case for requesting protective orders, but I did not know that my requests were wrong, and I was unaware of any potential punishment. "A statute is void for vagueness and unenforceable if it is too vague for the average

[1] Puckett v. State, 801 S.W.2d 188, 192 (Tex. App.—Houston [14th Dist.] 1990, writ ref'd). See also House Comm. on Civ. Prac., Bill Analysis, Tex. H.B. 3087, 75th Leg., R.S. (1997), (stating the purpose of the Texas Vexatious Litigant Statute is to curb a practice that "clogs the courts with repetitious or groundless cases, delays the hearing of legitimate disputes, wastes taxpayer dollars, and requires defendants to spend money on legal fees to defend against groundless lawsuits").

citizen to understand, and a constitutionally-protected interest cannot tolerate permissible activity to be chilled within the range of the vagueness." There is no requirement for admonishments or warnings about injunctive liability where the vexatious litigant designation is in fact an injunction against access to courts and an improper injunction nonetheless because it is imposed without a person ever having the rightful opportunity to know that their actions were problematic or to understand the potential consequences. Specifically, Tex. Civ. Pac. & Rem. Code, Chapter 11 is void for vagueness. The statute does not assert notice or hearing requirements or any sort of warning or clarification for punishable actions and the associated consequences. See where "a statute that does not give ordinary people fair notice of the conduct it punishes violates an essential requirement of due process." Johnson v. United States, 135 S. Ct. 2551, 2556 (2015). As the Court has written: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). The concept of punishment operates under the assumption that people can ordinarily choose whether to obey the law, the Court has "insist[ed] that laws give the person of ordinary intelligence a reasonable opportunity to" do so. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Furthermore, it is impossible to consider the consequences of an action (losing fundamental constitutional rights) when the action is actually allowed by law,

(filing an application for a protective order). I was completely unaware that my desperate attempts to keep up with Mark's abusive litigation tactics could bring such extreme consequences. I am not sure what method would be best for warning the public about the potential dangers of filing for a divorce in Collin County, Texas because there is an apparent risk that one can lose all their parental rights, (on appeal in cause 05-21-00242-CV), but there should undoubtedly be some sort of a warning that when filling out an application for a protective order the lawful action is punishable by way of being designated a vexatious litigant. Perhaps Collin County can place a warning notice on the application.

9. Cruel and Unusual. Common sense as well as the trial court record show that I did not know that filing a protective order application would impose significant barriers to the court access I would need to defend my parental rights. Perhaps if I had received a hearing for even just one of my applications for protection from Mark, I could have been admonished of what I was doing wrong and of the potential consequences. If Mark presented evidence and argument at the hearing on April 20, 2021, I could have defended myself and explained that I did not meet the statutory requirements for being designated vexatious. Mark argues in his reply brief that I am the exact type of person that the vexatious litigant statute was created for, yet I do not meet the criteria. Mark claims that the case in which I was declared to be a vexatious litigant was the 5th protective order application finally determined

against me. I argued in my original brief that none of the protective order applications were heard until the vexatious litigant hearing on April 20, 2021 at which time they were all simultaneously finally determined, and as such they were not finally determined prior to Mark's motion to designate me as vexatious as required by the statute. *See Exhibit B.*

Furthermore, there were not five litigations. I moved to strike the January of 2021 application, so that the trial court could focus on my motion for a continuance and interim attorney fees that I desperately needed to protect MCM and MAM. And, for the last application to count, it should have been heard after the vexatious litigant hearing and then stayed according to the plain language of statute. Additionally, this argument was not raised in trial court because no evidence and arguments were considered. I expressed this in my original brief as well as the harmful impact of such. My guilt was assumed based on bias. The trial court found me guilty without a hearing and evidence and punished me accordingly.

This Court can easily see that I am not a vexatious litigant, I am a mom who was forced to defend herself pro se, and Mark trapped me into a nightmare in which truly, all I want is to see my children again. Mark claims "Ms. Wilkerson is the exact type of person for which the vexatious litigant statute was created. The courts need something to deter parties like her from continually filing court proceedings over the same issues that have been finally determined against them," and hopefully, this

Court can see that I am the exact type of person that the Texas Supreme Court has confronted prior restrains for. I have attached Exhibit B, to further demonstrate my point See 443 S.W.3d 87, 57 Tex.Sup.Ct.J. 1428: "In evaluating whether state action exceeds constitutional bounds governing freedom of speech, courts "must give the benefit of any doubt to protecting rather than stifling speech." Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007).

10. No Adequate Remedy on Appeal. If this Honorable Court affirms my vexatious litigant designation, I cannot request mandamus relief that myself and my children desperately need. Affirmation of the vexatious litigant statute would violate my substantive due process right to equally access this Court for such relief. It already did when my initial mandamus petition was abated. Furthermore, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; no state shall deny to any person within its jurisdiction the equal protection of the laws, and the right of access to the courts." If I cannot request mandamus relief, neither can anyone else. According to the 14th Amendment Equal Protection Clause, Mandamus relief should be deemed unconstitutional, and as in my case, if there is no adequate remedy on appeal, litigants should just call a whaambulance. Or, perhaps the more reasonable solution is to simply call the vexatious litigant statute what it is, facially unconstitutional.

11. Lacking Actual Jurisdiction (LAJ). Additionally, the vexatious litigant statute also violated my procedural due process rights when the LAJ decided the merits of my mandamus petition -without a hearing. The LAJ lacked jurisdiction because she lacks standing; she was not elected to this Court to decide the merits of any mandamus proceeding. Furthermore, the LAJ was not appointed to the United States Supreme Court, so she lacks the authority to regulate my first amendment rights and any other constitutional right for that matter. See Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) and Smith v. Goguen, 415 U.S. 566 (1974) where "generally, a vague statute that regulates in the area of First Amendment guarantees will be pronounced wholly void." Winters v. New York, 333 U.S. 507, 509–10 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940).

12. Strict Scrutiny. Tex. Civ. Pac. & Rem. Code, Chapter 11 affords the state little to no compelling interest, and strict scrutiny should apply to deem the vexatious statute facially unconstitutional. The vexatious litigant statue has directly infringed upon my First Amendment right to petition as well as for free speech when I was prevented from filing litigation necessary to address the conflicting, abusive SAPCR orders that fraudulently imparted de facto termination of my parental rights. It is undeniable that the vexatious litigant statute significantly and directly burdened my right to defend my most precious, fundamental constitutional rights as well as MCM and MAM's rights. See also,

the vexatious litigant designation has restricted my ability to obtain necessary timely relief in a cause that has involved fraud, litigation abuse, malicious prosecution, and obstruction of justice. Me and my two young children have been kept from any and all contact for 16-months now, and for this fact as well as the potential for continued jurisdictional issues that Mark intentionally created, there is no adequate remedy on appeal, and I was denied my right to pursue mandamus relief that could have afforded the necessary accelerated review. See also: United States v. Stevens, 559 U.S., in which the statute was facially unconstitutional because "No set of circumstances exists under which [the statute] would be valid" and "The statute lacks any 'plainly legitimate sweep."); Dueitt, 180 S.W.3d at 741.

CONCLUSION

Rights are for People who can Afford Them. When I was called to Mark's motion hearing for my vexatious litigant designation on April 20, 2021, I knew the trial court would grant his request. Early on in proceedings, I would receive some of Mark's motions and think that there was no possible way the trial court was going to grant Mark's outrageous requests, but by April 20, 2021, I knew better. I could have never imagined however that I would still have the void created by the complete absence of my babies

I petitioned the trial court for protection from Mark because I needed it. I was familiar with Mark's abuse, but during the pendency of our divorce, I was blindsided

by a more abusive version of Mark than I ever thought possible. Rather than hearing me or helping me the trial court seemed to align with the extremely hateful presence of opposing counsel. They appeared to enjoy ruining my life, violating my rights to ensure that I was left without so much as even a fork after 14-years of building that life, and keeping me from MCM and MAM. I was unaware that the kind of evil existed where Mark and court professionals were capable of senselessly ripping my babies from my life. I've had to fight through insurmountable trauma and grief to get back up from this, I had to survive this, and I am still fighting in every way that I can to get back to my children and help them heal from this.

"A society that denies access to the courts for the least among us denigrates the law for us all." -Nathan Hecht.

PRAYER

I pray this Honorable Court find the civil liberties degradation that is the vexatious litigant statue, facially unconstitutional or in the alternative unconstitutional as applied in family law cases. I further pray this court reverse the order declaring me to be a vexatious litigant. If this Honorable Court can grant my requested abolishment of the defamatory public list or strike my name from it, I further pray this Court construe my brief in 05-21-00242-CV be construed as a

petition for writ of mandamus, so that I can see MCM and MAM as soon as reasonably possible.

/s/ Molly Wilkerson

Molly Wilkerson, Appellant

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on Mark Maldonado's Attorneys of record as listed below in accordance with the Tex. Rules of Civ. Proc. on May 12, 2021.

Attorneys for Mark Maldonado

G. Tony Mallers
Texas Bar No. 12861500
tmallers@cowlesthompson.com

Claire E James
Texas Bar No. 24083240
cjames@cowlesthompson.com

Gracen M. Daniel
Texas Bar No. 24116248
gdaniel@cowlesthompson.com

Julia F. Pendery
Texas Bar No. 15744050
jpendery@cowlesthompson.com

/s/ Molly Wilkerson

Molly L. Wilkerson /Pro se

Phone: 214-636-4719
Email: missmolly2020@aol.com
Adress: 218 Castleridge dr.
Little Elm, TX 75068

CVFG@GR ?+ MPGEGL ?J @PGCD

In The Court of Appeals
Fifth District of Texas at Dallas

IN THE INTEREST OF M.C.M AND M.A.M., CHILDREN, et al.

How can legal semantics sold to the highest bidder in a contentious divorce/custody suit ever justify unnecessary suffering from deprivation of the parent-child relationship?

This is a Human Rights Issue

In The Court of Appeals Fifth District of Texas at Dallas
Cause No: 05-21-00242-CV, 05-21-00373-CV, 05-21-00360-CV

On Appeal From the 366th Judicial District Court
Collin County, Texas
Trial Court Cause No: 366-53554-2020; 366-50778-2021, 366-50795-2021

APPELLANT BRIEF

Molly Wilkerson / Appellant, Pro Se
missmolly2020@aol.com
214-636-4719
218 Castleridge Dr. Little Elm. 75068

Oral Argument Requested

IN THE INTEREST OF MCM AND MAM, CHILDREN et al.

IDENTIFICATION OF PARTIES AND COUNSEL

Molly Wilkerson Attorneys of Record

Civil Defense

Laura Hayes
State Bar No. 24041126
5420 LBJ Freeway, Ste. 1200
Dallas, TX 75240
Phone: 972-991-0889
laurahayes@foxrothschild.com

Criminal Defense

Rachel Wimbish Lopez
Texas Bar No. 240640181
2620 Gus Thomasson Rd., Ste 102A
Mesquite, Texas 75150
Phone: 214-740-4878
rachel@wimbishlopez.com

Michael R. Casillas,
Texas Bar No.03967500
8111 LBJ Freeway, Ste 1502
Dallas, Texas 75251
Phone: 214-748-5202
michael@londonlawdfw.com

Mark Maldonado's Attorneys of Record

George A. Mallers
Texas Bar No. 12861500
gmallers@cowlesthompson.com

Claire E. James
Texas Bar No. 24083240
cjames@cowlesthomson.com

Gracen M. Daniel
Texas Bar No. 24116248
gdaniel@cowlesthompson.com

Julia Pendery
Texas Bar No. 15744050
jpendery@cowlesthompson.com

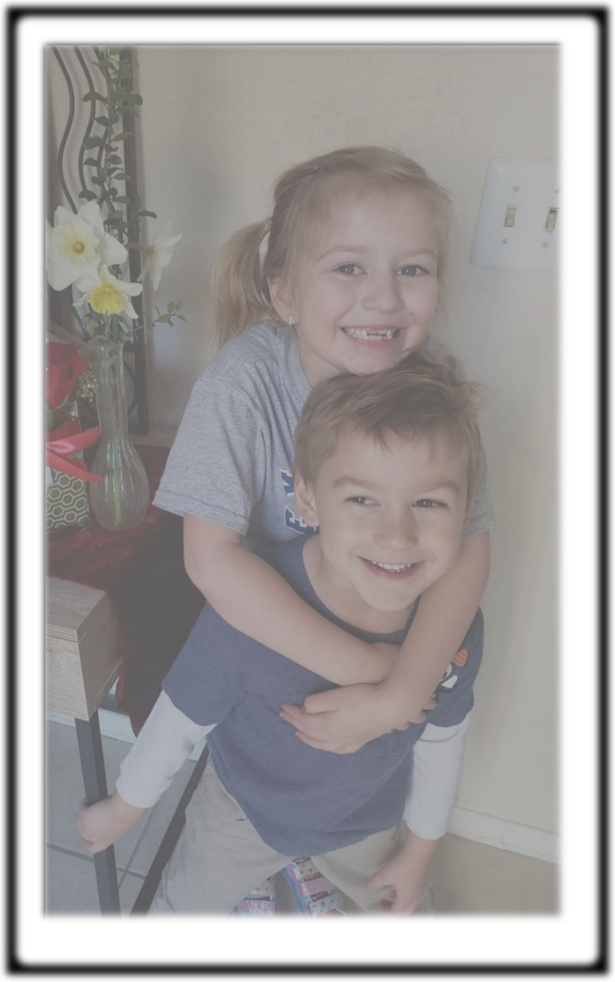
Cowles and Thompson
4965 Preston Park Blvd., Ste.320
Plano, TX 75093
(214) 672-2000

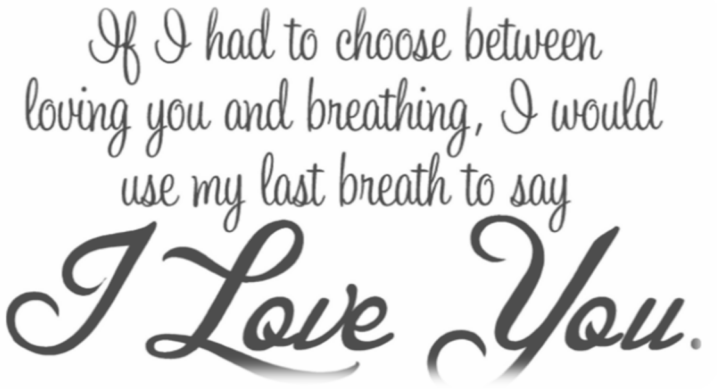
Hon. Judge Emily Miskel
470th District Court
Russell A. Steindam Courts Bldg.
2100 Bloomdale Road, Suite 20146
McKinney, TX 75071
972-548-5670

Hon. Judge Tom Nowak,
366th Judicial District Court
Russell A. Steindam Courts Bldg.
Bloomdale Road, Ste. 30146
2100 McKinney, TX 75071
Phone: 972-548-457

Hon. Judge Audra Riley,
Criminal District Court 3
Frank Crowley Courts Bldg.
133 N. Riverfront Blvd., 6th Floor
Dallas, TX 75207
Phone: 214.653.5800

It is undisputed, Appellant's efforts in this matter are for Milanna and Makade. "They deserve the world; they are my world."





IN THE INTEREST OF MCM AND MAM, CHILDREN
et al.

TABLE OF CONTENTS

Matter of the Marriage

Suit Affecting Parent-Child Relationship

Mark's Protective Order

Vexatious Mom

IN THE INTEREST OF MCM AND MAM, CHILDREN
et al.

INDEX OF AUTHORITIES

LOCAL RULES

STATUTES

CASE LAW

FEDERAL STATUTES

CONSTITUTIONAL LAW

REFERENCES

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doi:10.1017/S1352325204000163 ……..…..… 17

IN THE INTEREST OF MCM AND MAM, CHILDREN et al.

STATEMENT OF CASE

TO THE HONORABLE JUSTICE OF THE 5TH COURT OF APPEALS,

The four orders listed below within these three appellate cases summarily equate to the deprivation of the parent-child relationship - the very heart of life, liberty, and the pursuit of happiness. Molly, MCM, and MAM have been sine qua non for 14-months now with no adequate remedy on appeal or otherwise.

I. NATURE OF CASES

1. The three cases that all touch upon the deprivation of Molly, MCM, and MAM's civil liberties: 05-21-00242-CV is the underlying case which includes the *Order Denying Claim of Informal Marriage* entered on January 27, 2021, (CR1, P. 948), and the *Final Order in Suit Affecting the Parent-Child Relationship*, (CR1, P. 1247), rendered on January 27, 2021, and modified at order entry on March 3, 2021.

2. Prior to SAPCR order entry on March 3, 2021, there was a hearing on the next case at issue: 05-21-00373-CV, *Final Protective Order, (*CR2, P. 30), entered on March 3, 2021.

3. The other associated case before this court is 05-21-00360-CV, which is Molly's PO case. The order addressed herein this appeal is the *Order Declaring Molly Wilkerson a Vexatious Litigant* rendered on the day her PO was denied and entered on April 21, 2021. (*CR3, P. 48, Order Declaring Molly L. Wilkerson a Vexatious Litigant*)

~ See Additional Problematic Orders ~

1) *Order Granting Respondent's Motion for Bifurcated Trial* - 8/4/20 – CR1, P. 82;
2) *Order On Petitioner Molly Wilkerson's Motion For Sanctions For Abuse Of Discovery Process* - 11/18/20 – CR1, P. 611;
3) *Order on Respondent Mark Maldonado's Motion to Consolidate* - 11/18/20 – CR1, P. 604;
4) *Further Temporary Order* - 1/7/21 – CR1, P. 692;
5) *Order on Respondent Mark Maldonado's Motion for Sanctions for Failure to Comply with Order on Motion to Compel* – 1/20/21, CR1, P. 755;
6) *Order On Mark Maldonado's Motion To Seal Court Records* - 03/31/21, CR1, P. 1517;
7) *Order of Enforcement by Contempt* - 03/31/21, CR3, 1521;

II. STATEMENT OF JURISDICTION
~ IN LAW AND IN EQUITY ~

1. Justice requires the delicate balancing of law and equity whereas in this case, holding letter of the law above rule of law afforded its weaponization and equity's suffocation. Appellant moves this Honorable Court to consider any and all options for equitable relief as there is no adequate remedy at law when the law has been reduced to subjectively applied statutory obstacles to justice. It seems logical that where the abuse of lawful process has disturbed the balance of justice, this Court's equitable jurisdiction should have authority to exceed lawful reach.[1] For all purposes, this brief should be construed as a petition for mandamus relief especially if any case or order referenced herein falls to lack of jurisdiction as intentioned by Mark via fraud on court. **Appellant requests this Court construe her brief as a Petition for Writ of Mandamus as there could be no question as to, "there is no adequate remedies on appeal."** See wherein absence of appellate jurisdiction appeal can be construed as a petition for writ of mandamus, "writ of mandamus will issue when a trial court clearly abuses its discretion and there is no adequate remedy by appeal." *In re John G. and Marie Stella Kenedy Mem'l Found.,* 315 S.W.3d 519, 522 (Tex.2010) (orig. proceeding).

[1] Equity's role within the courts "is to prevent the law from adhering too rigidly to its own rules and principles when those rules and principles produce injustice" ….. "Given that equitable principles are not absolute in nature, it is acceptable for the courts to depart from any rules when they conflict with justice." (Beever, 2004).

2. This court has jurisdiction over the appeals in TC Cause No. 366-53554-2020 / COA Cause No. 05-21-00242-CV and TC Cause No. 366-507780-2021 / COA Cause No. 05-21-00373-CV. The order **sealing the *Order Denying Claim of Informal Marriage*** in the string tying a mother to her babies via continuing jurisdiction of the 366th District Court of Collin County.

3. This Court does not likely have jurisdiction over trial court cause, 366-51795-2021 / COA Cause No. 05-21-00360-CV. Fraud and obstruction of justice prompted the dismissal of the underlying suit for dissolution of marriage on January 26, 2021, (order entered January 27, 2021), and the trial court no longer had plenary power when orders were entered in this associated cause. As such, Appellant respectfully requests this Court construe her brief for 05-21-00360-CV as a petition for writ of mandamus for vacatur.

III. ORAL ARGUMENT

Oral argument may help the Court better understand the nature of the dispute, the relationship of the parties, and the fraudulent acts that have occurred -which are significant to these appeals. Additionally, clarification could assist the Court ascertain subtle, yet intentional post-separation abuse via pleadings and court proceedings and the resulting impact on and of final order outcomes.

IV. ABBREVIATIONS AND TITLES FOR CONTEXT

Records References

A. Clerk's Records

(1) The clerk's records in cause 366-53554-2020 will be referred to as CR1 with page number.

(2) The supplemental clerk's record in cause 366-53554-2020

will be referred to as CR1 Sup. with page number.

(3) The clerk's records in cause 366-50778-2021 will be referred to as CR2 with page number.

(4) The clerk's records in cause 366-51795-2021 will be referred to as CR3 with page number.

(5) The supplemental clerk's records on indigency hearing associated with 401-366-53554-2020 will be referred to as CR4 Sup with page number.

B. Reporter's Records

(1) The reporter's records in cause 366-53554-2020 will be referred to as RR1 followed by volume number , page number, and line numbers.

(2) The reporter's records in cause 366-50778-2021 will be referred to as RR2 followed by volume number, page number, and line numbers.

(3) The reporter's records in cause 366-51795-2021 will be referred to as RR3 followed by volume number, page number, and line numbers.

C. Supplemental Reporter's Records

(1) The supplemental reporter's records in cause filed to reflect all three associated cases, 366-53554-2020, 366-50778-2021, and 366-51795-2021, will be referred to as RR Sup. 1, followed by volume number , page number, and line numbers.

V. WRIT OF HABEAS

On June, 5 2021, Molly tried to file a Writ of Habeas but was denied filing. There has also been a denied request to necessary equitable relief for a writ of mandamus on November 17, 2021. See "The All Writs Act, statute, 28 U.S.C. § 1651, authorizing to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

IN THE INTEREST OF MCM AND MAM, CHILDREN
et al.

STATEMENT OF FACTS

1. It is undisputed that Mark and Molly began dating in 2005; on or about January 28, 2006, they entered into an exclusive relationship and began living together. Molly was 22 at the time, and Mark was 31. (RR Sup. 1, Vol. 002). They lived together as a family, and they shared a home and two children together.

> [So I'm going to grant the Respondent's request for directed verdict as to the issue of marriage. I do find that no marriage existed, but the parties did cohabitate, the parties did live together, they did have children together, but there was no formal marriage or informal marriage based on the evidence that was presented today.]
> RR1, Vol. 002, p. 4, Lines14-20.

2. On January 29, 2006, one day after Mark and Molly made their relationship exclusive, Mark was in a catastrophic motorcycle accident. Molly took care of Mark throughout his recovery. When Mark was diagnosed with testicular cancer later that same year, Molly was once again his support system. (RR Sup. 1, Vol. 002, P. 38, Lines 6-10).

3. In 2008 and 2009, Molly's diagnosis with endometriosis and subsequent surgeries for such put a sense of urgency on starting a family before

infertility became an issue; however, Molly would not start a family without the security of a marriage, and Mark would not formalize a marriage because he claimed that Molly's score would interfere with their ability to accumulate rental properties. *See RR Sup. 1, Vol. 002, Pg. 38, Lines 11-25.*

> Q. Can you explain for the Court what the issue was -- with that was and how it prevented you from wanting to marry Ms. Wilkerson?
> A. That was a mild point, but essentially wanted **to get us into another house at some point**. And she wanted to file bankruptcy because she was unable to clean up her credit. And --
> MS. JAMES: Objection; nonresponsive.
> THE COURT: Sustained.
> Q. (BY MS. JAMES) Were you waiting --
> THE COURT: Mr. Maldonado, please just answer the question. Don't go any further.
> RR Sup. 1, Vol. 002, P. Lines 13-19.
>
> Q. (BY MS. WILKERSON) Mr. Maldonado, do you recall my struggles with endometriosis in 2008?
> A. Yes, ma'am.
> Q. Do you recall my struggle with endometriosis continuing with 2009?
> A. Yes, ma'am.
> Q. How many surgeries did I have to have at that point?
> A. I believe you had at least two, if not more, laparoscopic surgeries.
> Q. What did Dennis Eisenberg tell us in regards to our timing of having a family?
> A. That it should be done sooner than later.
> RR Sup. 1, Vol. 002, P. 59, Lines 2-18

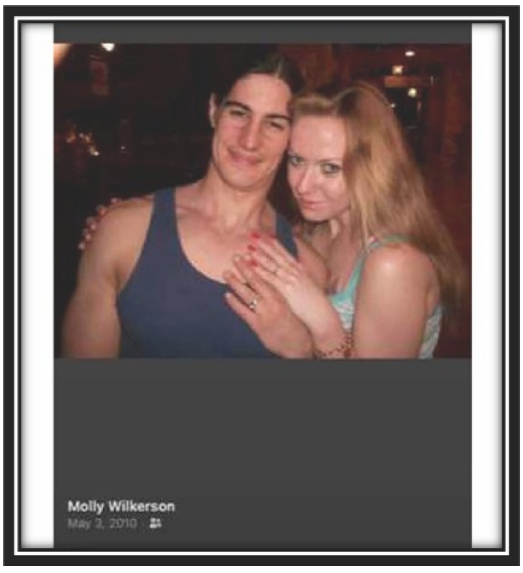
4. Molly was willing to forgo the formal marriage for an informal marriage so that they could move on from that point of contention, so Mark and

Molly committed themselves to marriage informally on May 3, 2010. *See RR. Sup. 1, Vol. 002, Pg. 39, Lines 8-15.*

5. Molly's dad testified that Mark and Molly had an informal marriage ceremony, but he would not attend because he was disappointed about it. *RR Sup. 1, Vol. 002, P. 44, Lines 5-10.*

6. Molly was excited nonetheless and showed off the rings to her friend. Kristen Meyers testified to her knowledge of the agreement to be married that Mark and Molly made on May 3, 2010. Ms. Meyers further testified that she had witnessed both Mark and Molly refer to one another as "husband" or "wife." (RR Sup. 1, Vol 002, P. 162-169).

7. Mark and Molly took a photo while wearing their wedding rings to commemorate the informal marriage on May 3, 2010. *See RR Sup, Vol. 007, P. 9, Exhibit 4.* RR Sup. 1, Vol. 007, P. 9.



8. Mark testified that Mark and Molly were in fact wearing wedding bands in celebration a the Gaylord resort in May of 2010. (P. 56, Line 13 – P. 58, Line 9).

9. Mark also testified that Molly was the beneficiary on all his accounts.[2]

> BY MS. WILKERSON:
> Q. So at the time that you named me beneficiary on all of your accounts, and still did up throughout that period up until lately, you named me beneficiary just for the children?
> A. Yes, ma'am.

10. Paul Wilkerson Sr. testified that he has publicly acknowledged the marriage, and even devoted his own time and money into remodeling Mark and Molly's home. (RR Sup., Vol. 002, Pg. 48 - Lines 20-25, Pg. 49 – Line 8).

[2] Undisputed evidence is conclusive when a party admits that the evidence of a vital fact is true.

11. Paul Wilkerson Jr. testified that "all he had ever known of was Mark as his brother-in-law, Mark referred to Molly as his wife, and that their families spent every holiday together."

> Q. Mr. Wilkerson?
> A. Yes.
> Q. Have you referred to Mr. Maldonado as your brother-in-law?
> A. One hundred percent of the time. In fact --
> MS. JAMES: Objection; hearsay.
> MS. WILKERSON: Objection; nonresponsive.
> RR Sup. 1, Vol. 002, P. 151, Lines 4-10.

> [Q. (BY MS. WILKERSON) Have you called him anything other than your brother-in-law?
> A. His name.]
> RR Sup. 1, Vol. 002, P. 151, Lines 20-22.

> [Q. (BY MS. WILKERSON) Mr. Wilkerson?
> A. Yes, ma'am.
> Q. Has Mr. Maldonado ever referred to me as his wife?
> A. Yes.
> Q. And did we celebrate every holiday together as a family?
> A. Yes.
> Q. Would his mother and father come to our Christmas celebrations?
> A. Yes.
> Q. Was his mother and father at your wife's baby showers?
> A. Yes.]
> RR. Sup. 1, Vol. 002, P. 153, Lines 1-14.

12. Aside from attending holiday events together as a family, Mark and Molly attended social functions together:

> [Q. You mentioned that you know Mr. Maldonado pretty well.

A. Yes.
Q. Has he been to your home before?
A. Yes.
Q. Has he brought an e-pen to your home before?
A. Yes.
Q. Was it a cigarette pen or a marijuana pen?
MS. JAMES: Objection, calls for speculation.
THE COURT: If the witness knows.
A. Marijuana.
Q. Did you witness him using it?
A. No.
Q. Did he go to your room with it?
A. Yes.
Q. Was this within the last year?
A. Yes.
Q. On that day were we at a celebration at your home?
A. Yes.]

See RR Sup. 1, Vol. 004, P. 15, Lines 1-13.

13. Mark and Molly shared accounts together; *see JP Morgan Joint Tenants,* CR1, Pg. 824-825 and RR Sup. 1, Vol. 002, P. 11.

Accounts Assigned to your Retirement Goal

Accounts	Account Holder	Account Number	Portfolio Objective - Account
Joint Tenants With Right of Survivorship Select	Mark Maldonado & Molly Louise Wilkerson	XXX-XX925-1-9	Balanced Toward Income

Note: It is important to review your account(s) to keep your investments aligned with your risk tolerance and positioned to achieve your

14. Mark and Molly had 30-year term life insurance policies to protect them throughout the lifetime they committed to sharing together.

> [THE COURT: Ms. Wilkerson, this isn't an opportunity for you to figure all this stuff out. What is it you're trying to introduce?

> MS. WILKERSON: I am trying to introduce this evidence that we --
> THE COURT: Why?
> MS. WILKERSON: -- had life insurance policies out on each other because that would prove intent to be together forever. If you have a term life insurance policy for $300,000 and you have a beneficiary listed and you have them for 30 plus years, you clearly intend to live a life together as a marital couple.]
> RR Sup. 1, Vol. 002, P. 128, Lines12-34.

15. Molly felt confident enough in the legitimacy of the informal marriage to have two planned pregnancies: Mark and Molly brought baby girl, MCM, into the world on February 11, 2013 and baby boy, MAM, on July 24, 2015. (CR1, p. 34).

> [My circumstance is not of woman that sought illegitimate rights after a few years of living together. My circumstance is that of a woman that wholeheartedly believed that this man vowed to me upon that phase of our lives together in which we built a family.]
> RR Sup. 1, Vol. 002, Pg. 174. Lines 8-13

16. Mark requested FMLA time off work from his employer after Molly had their children via c-sections, "to take care of his spouse" while she recovered from surgery. *See RR Sup. 1, Vol. 007, P. 16.*

17. Molly was already familiar with taking care of MCM by herself, and when MAM arrived, she took care of MCM and MAM primarily on her own because Mark was rarely around, and when he was, he was either outside in the yard or in the garage tinkering with one his classic cars, the boat, or his motorcycle.

> [A. Your concerns, sometimes you would be stressed because you would be trying to do everything with the kids because he was studying or writing papers or --
> MS. JAMES: Objection, non-responsive. I'm sorry. I withdraw my objection, Your Honor.
> THE COURT: You may finish your question -- excuse me, your answer, ma'am.
> A. Thank you, Judge. He was busy with school or working or working out in the yard a lot when he was at home or working on cars or bikes.]
> RR Sup. 1, Vol. 004, P. 40, Lines 12-21.

18. Molly worked 15 hours a week on average so that she could be available to provide care for MCM and MAM as preschoolers, she could not afford food and health insurance for the children without Mark's help; but he declined to support his family.

> [MS. WILKERSON: In 2017, I was at a place where I didn't want to be on food stamps, I didn't want to feel like I was forced to be frauding the government because I couldn't provide groceries, I didn't want to be forced to live with him. My kids were old enough to go to preschool. I put them in preschool. I had previously raised them, not 100 percent by myself but mostly by myself. He was there, and he was financially supportive, but he was not, for almost four years, while I was working part-time and not working at all.]
> RR Sup 1, Vol. 004, P. 106, Lines 7-16.

19. MCM and MAM were on welfare from the time they were born until October of 2017 when Mark and Molly were investigated for welfare fraud because, even though Mark had a means of providing health insurance and even groceries for his family, he declined to do so. See RR Sup 1, Vol. 007, P. 60.

20. In January of 2020, Molly left Mark under the premise that she was leaving temporarily to work on graduate school, and Mark did not want their family or friends to be aware of the separation -he didn't want Molly to leave.

> [We were always considered a married couple by anyone that knew us. The fact is also demonstrated -- Respondent's own family acknowledged us, every single one of them, in all of the cards and all the years that we've been addressed as Ms. And Mr. Maldonado or the Maldonado family.]
>
> [So this is a conversation between me and Mr. Maldonado. Mr. Maldonado, can you take a second and then tell me if you recognize this conversation?
> A. Yes. This looks like it was earlier in -- early 2020 after we had just separated.
> Q. Okay. So you mentioned right on the -- one of the lines here, it says, none of my family knows we are separated or my friends?
> A. Correct.]

21. On June 1, 2020, Mark filed a SAPCR suit and never notified or served Molly, so when she filed for divorce on June 30, 2020, Mark was afforded the opportunity to unlawfully plead to sever the divorce cause from the SAPCR cause. His alternative request to bifurcate was granted on August 4, 2020. *See Docket Sheet for 366-52880-2020 (Consolidated Case), CR1, p. 31.*

22. Molly was placed on inequitable ground when Mark asserted that, because of the case bifurcation, the trial court could not grant Molly's requested temporary orders for necessary attorney's fees or spousal support,[3] and Appellant

[3] The court can enter temporary orders concerning the children, including interim attorney's fees. Texas Family Code §105.001

was subsequently denied primary conservatorship of MCM and MAM. See Petitioner's Brief in Support of Granting Temporary Orders, CR1, p. 106.

> [And I do think they put things in like the thing with when we first started this about bifurcating. Tony Mallers bifurcated the case so that you couldn't -- and then he told you weren't allowed to order attorney's fees, which is a lie because you can on a Family Code.]
> RR3, Vol. 001, p. 9, Lines 17-2130.

23. Before Molly filed for divorce, Mark had never once made allegations against Molly's competency as a mother, Molly was always the one to take care of MCM and MAM, and Mark was confident enough in her abilities as a mother that he was perfectly fine not being there.

> [Q. You don't have any personal knowledge of whether or not Mr. Maldonado took the kids to the doctor?
> A. Not ever that I'm aware of.]
> RR Sup. 1, Vol. 004, P. 45, Lines 22-25

24. In August and September of 2020, Mark and his attorneys harassed Molly through claims that she was on drugs. Her initial drug test came back with an inconsistent chain of custody and no MRO report. Mark demanded that Molly have no possession and access rights to the children, but the trial court allowed Molly to maintain her expanded standard possession schedule after one weekend of supervised visitation because three subsequent drug tests and a substance abuse evaluation confirmed that Molly was not an illicit drug user. (CR1, P.167; CR1, P. 176; CR1, P. 231; CR; 272, CR1 Sup. 1, P. 61-89)

25. Mark canceled mediation scheduled for November 9, 2020 that could have allowed Molly and Mark to work together in the best interest of MCM. *See RR Sup. 1, Vol. 007, OC Mark's Atty Fees, Invoice, P. 668.*

Date	Atty	Description	Hours	Rate	Amount
10/09/20	CEJ	Communicate with mediator to cancel mediation; correspond with T. Mallers and G. Daniel regarding status of case; call with client; attention to hearing scheduling matters; [redacted]	1.80	250.00	450.00

26. Laura Hayes had worked constantly to keep on top of OC's vulturous discovery demands, and she was forced to withdraw the day before Mark's motion to compel was heard, (CR1, P. 403), so at Mark's October 16, 2020, *Motion to Compel hearing*, Molly had already submitted two extensive rounds of discovery that demonstrated compliance and two rule-eleven agreements, (CR1 Sup. 1, P. 25 and CR1 Sup. 1, P. 40), that showed good faith in attempting to deal with Mark and OC's harassment. (CR1, 405).

27. While harassing Molly with excessive discovery demands and frivolous hearings, Mark was simultaneously declining to submit to Molly's reasonable discovery requests, so Molly requested sanctions against him and OC for abusing the discovery process. (CR1, P. 242).

> THE COURT: Okay. Have you had an opportunity to listen to this audio, Ms. Wilkerson?
> MS. WILKERSON: No, Your Honor.

THE COURT: It has not been tendered at all to you?
MS. WILKERSON: Not -- I mean, no. I have not received it or heard it at any point.
MS. JAMES: Your Honor, we did produce this recording in discovery. We also tendered it to
Ms. Wilkerson when we sent her our exhibits last week.
MS. WILKERSON: What day was that?
MS. JAMES: I believe the pretrial hearing was on the 20th.
MS. WILKERSON: So you sent it six days ago? She sent it six days ago, Your Honor? I will object on that ground as well. They didn't submit discovery.
THE COURT: Okay. The objection is going to be overruled. You may play the audio. (Respondent's Exhibit 96 played over Zoom.)
Q. (BY MS. JAMES) Mr. Maldonado, what is the date
(Note: record discrepancy)
RR Sup. 1, Vol. 002, P. 77, Line 21 – P. 79, Line 25**.**

28. Molly presented her first pro se motion during Mark's consolidation hearing on November 17, 2020, *Motion for Sanctions*, and she received a warning of caution as to the three attorneys when the trial court struck their claims that Molly's request was frivolous yet awarded Mark fees for all three attorneys having to address her motion. (CR1, P. 611).

29. The trial court denied Mark's request to bifurcate the final trial on November 17, 2020. the Bifurcation Order. (CR1, p.573 and CR1, 604).

30. On November 20, 2020, Mark requested an emergency writ of habeas and writ of an attachment via email after OC informed Molly that she would have no Thanksgiving time with MCM and MAM the day before her weekend with them

was supposed to begin. The trial court found that, according to the school calendar, it was Molly's period of possession and denied the writs.

> MS. WILKERSON: There is absolutely no truth to me keeping them. You have ruled in my favor for the Thanksgiving incident. They were trying to keep the children from me for an entire month period. And I fought really hard for my weekend, and that's why – I mean, they keep bringing it up, but that's why I won because honestly the school schedule said that.
> RR Sup. 1, Vol. 004, P. 135, Lines 17-23.

31. On January 6, 2021, Mark filed yet another writ of habeas and writ of attachment petition, this time ex parte, which included a request to change conservatorship. The trial court denied the writs as unnecessary yet entered Mark's ex parte proposal to "temporarily" terminate Molly's parental rights via his proposed order in the ex parte writ requests pleading. (See CR1, Sup.1, p. *Respondent's Second Emergency Ex Parte Application for Writ of Habeas Corpus and for Writ of Attachment*, p.42; and see *Amended Motion to Enter)*.

32. On January 8, 2021, Molly requested court appointed counsel, and at pretrial conference on January 20, 2021, Molly requested a continuance and interim attorney's fees -*CR1, P. 750.*

> *Q. (By Ms. Varela)* Do you recognize the document I just handed you?
> *A.* Yes, ma'am.
> *Q.* And did you fill that out?
> *A.* Yes, ma'am.
> *Q.* And submit it with the Collin County Indigent Defense Office

on January 8th of this year?
RR-Sup. 1, p. 8, Lines 19-25

33. Mark failed to submit discovery requests, and Molly was subjected to trial by ambush which started just days before final trial. See Mark's last-minute filings and disclosures which were not provided in discovery:

(a) Order On Respondent Mark Maldonado's Motion For Sanctions For Failure To Comply With Order On Motion To Compel,01/20/2021, (**CR1, p. 755**)
(b) Respondent's Outline For Trial 01/20/2021, (**CR1, p.761**);

(c) Respondent's Witness List For Trial 01/20/2021, **(CR1, p. 767);**

(d) Respondent's Exhibit List For Trial 01/20/2021, (**CR1, p. 771**);

(e) Respondent's Amended Exhibit List For Trial, 01/21/2021,(**CR1, p.783**);

(f) Respondent's Trial Brief On Informal Marriage, 01/22/2021,(**CR1, p. 793**);

(g) Respondent's Second Amended Exhibit List For Trial,01/25/2021, (**CR1, p. 802**);

(h) Mark Maldonado's Proposed Parenting Plan, 01/25/2021, (**CR1,p.816**);

(i) Mark Maldonado's Amended Proposed Parenting Plan,01/27/2021, (**CR. p. 938**).

[THE COURT: Okay. Have you had an opportunity to listen to this audio, Ms. Wilkerson?
MS. WILKERSON: No, Your Honor.
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> MS. WILKERSON: So you sent it six days ago? She sent it six days ago, Your Honor? I will object on that ground as well. They didn't submit discovery.]
> RR Sup. 1, Vol. 002, P. 79, Lines 4-21.

34. Mark called several witnesses to swear-in on trial day one claiming that they would testify on trial-day-two for the SAPCR portion of trial, yet most of the witnesses were never called. Molly was placed in the sudden position of having to choose between having her witnesses either testify to the matter of the marriage or to her characteristics as a mother, and with Mark's sudden pleadings claiming he wanted her rights and access to the children limited, Molly of course chose to have her witnesses testify the next day for the sake of MCM and MAM.

> [THE COURT: All right. I'm going to put him in the waiting room then. All right. Ms. Wilkerson, you may call your next witness.
> MS. WILKERSON: My witnesses -- the rest of my witnesses are for the matter of Milanna and Makade Maldonado.]
> RR Sup.1, Vol. 002, Pg. 52, Lines,18-24.

35. When Molly swore in at temporary orders hearing on August 12, 2020 and was not required to swear in at any of the countless subsequent hearings, and when the procedure at final trial was to swear in witnesses the first day of trial even if they weren't testifying until trial-day-two or at all even -like with most of Mark's witnesses. Molly had no reason to believe that her statements at trial-day-one were anything other than sworn testimony. See RR1 Sup. 1, Vol. 002, where witnesses

sworn in on January 26, 2021 was sufficient for testimony on January 27, 2021, *RR Sup. 1, Vol 003 and Vol. 004.*

36. Mark's attorney, Claire acknowledged Molly's initial statements as testimony and that Molly testified to the following facts:

> Q. You heard her testimony that she -- that you purchased vehicles together; is that true?
> RR. Sup. 1, Vol. 002, P. 95, Lines 19-20.
>
> Q. Mr. Maldonado, you heard testimony about your life insurance policies, correct?
> RR Sup 1, Vol. 002, P. 99, Lines 7-8.

37. Proceedings prior to trial, trial itself, and post-trial proceedings were modified for COVID-19, Zoom standards, no one took the bench, and considerations for previously being sworn in were consistently applied. See RR2, Vol. 1, where Jesse Adkins was sworn in on February 24, 2021 was acceptable for proceedings held on March 3, 2021.

> MR. MALLERS: Jessie Adkins, A-d-k-i-n-s, I believe.
> MR. ADKINS: Yes.
> THE COURT: Are you Mr. Adkins?
> MR. ADKINS: Yes, I am.
> THE COURT: All right. Mr. Adkins, if you would do me a favor, please raise your right hand. (Witness sworn.)
> RR2, Vol. 001, P. 6, Line 1 – P. 8, Line 10.

38. Prior to the start of trial-day-one on January 26, 2021, Molly's evidence vanished from the Google folder she shared with the trial court and OC, so Molly requested the trial court take judicial notice of her trial brief in support of the

informal marriage. Molly had several witnesses testify, and she produced documentary evidence to prove the existence of the informal marriage.

> THE COURT: Yes. I did receive a link that allowed me to get into a folder entitled "trial evidence," but the only thing in there is one document.
> MS. WILKERSON: That's unusual.
> RR Sup. 1, Vol. 002, P. 35.

39. The trial court would not allow Molly to discuss anything other than the existence of the marriage on trial-day-one including issues of domestic abuse:

> [MS. WILKERSON: There was underlying abuse in this situation and I have a witness to testify.
> THE COURT: Okay. All right. So, again, ma'am, with regards to whether or not there was a marriage, do you think it helps or hurts your case that you broke up in the middle of the time frame that you're talking about?
> MS. WILKERSON: It helps my case to understand the circumstance of why we separated in 2008 prior to marriage because it helps the Court to establish his nature in terms of being abusive and manipulative towards me.
> THE COURT: Okay. So the objection will be sustained as irrelevant. You may proceed on, Ms. Wilkerson.]
> RR Sup. 1, Vol. 002, P. 112, Lines 11-25.

40. On January 26, 2021, when the trial court rendered a verdict finding agreement to be the only prong not established to prove the existence of the informal marriage, Molly attempted to raise her additional claim of putative spousal rights. Molly had previously raised the issue in her brief at trial and she later submitted a request to the trial court to reconsider her putative spousal rights. (CR1, p. 1362).

> [MS. WILKERSON: Your Honor, did he - - did he - - did I believe it is the other question. So on the other issue I raised with a putative spouse, did I believe that he had an agreement? Did he present himself as though - -
> THE COURT: So at this point in time, Ms. Wilkerson, the ruling of the Court has already been entered. You are welcome to appeal that ruling if you wish. All right?]
> RR1, Vol. 002, p. 5, 4, Lines 21-25, 1-3

41. When Mark began his trial warfare via pleadings, Molly briefly had a chance to see the CPS model of possession and access requests Mark was making; however, at trial, he served an amended version to his parenting plan. *Mark Maldonado's Proposed Parenting Plan*, 1/25/21, CR, P. 816. And *Mark Maldonado's Amended Proposed Parenting Plan*, 1/27/2021, CR, P. 938.

42. Bylee Jo O'Mary, Paul Wilkerson Jr., Kollin Mitchell, Kristen Myers, Krystal Monteymayor, Nicole May, and Bryan McCurry all testified that Molly is a good mother, that she did not drink excessively or do drugs, and that MCM and MAM were safe with Molly and needed her and she had been the one that primarily raised them. *RR Sup. 1, Vol. 004, P. 29, Line 7 – P. 121, Line 5.*

43. Mark fabricates whatever truth is most beneficial to him.

> Q. Mr. Maldonado?
> A. Yes.
> Q. Do you recall temporary orders hearing on August 12th, 2020?
> A. Yes.
> Q. Did you state that you have been the one to take care of the children their entire lives?
> A. Yes.

> Q. No further questions, Your Honor.
> RR Sup. 1, Vol. 004, P. 13, Lines 12-20.
>
> Q. Yes. Have you ever claimed that status out of convenience?
> A. I've claimed it out of being the truth.
> Q. Okay. Have you ever used DARS services, Department of Rehabilitative Services, to fund your schooling?
> A. Yes, ma'am. I was in a wheelchair for a year.
> Q. Are you permanently disabled?
> A. That's what my surgeons have labeled me as, yes, ma'am.
> Q. How much can you dead lift, Mr. Maldonado?
> A. I'm not sure.
> Q. How much can you squat?
> A. I'm not --
> MS. JAMES: Objection, Your Honor, relevance.
> THE COURT: Ms. Wilkerson, what does this have to do with your marriage?
> MS. WILKERSON: Welfare fraud. He claimed from 2014 on that we were not married so that we could get welfare benefits of groceries and he wouldn't have to pay insurance for the children.
> RR Sup. 1, Vol. 002, P. 122, Line 18 – P. 123, Line 14.

44. While Mark consistently had his attorneys testify for him, he did not have a single witness testify that had personal knowledge of Mark or Molly as a couple or as parents. *See RR Sup. 1, Vol 002 -Vol. 4.*

45. Following day two of final trial, the trial court made a final oral ruling on record which, for Molly, was supposedly JMC with "slightly" modified possession and access but more closely resembled a possessory conservatorship because she has an issue with "having problems with people telling you what to do." *See Final Ruling Rendered, P. 150, Line 115 – P. 174, Line 10.*

46. Mark's requested precedent conditions subjected Molly's possession and access rights to his approval because Mark could simply claim that Molly was not following the orders. (*See drug tests and SAE's noticed to court, CR1-Sup1, p.61-89*)

> [Q. (BY MS. WILKERSON) Mr. Maldonado, prior to the 5th, when I thought I had met conditions precedent, did I pass my drug test?
> A. I don't know. I'm not an interpreter of drug tests pass –
> Q. Did I pass my SAE?
> A. I don't have information of the requirements as far as the appropriate acknowledgement if they were done correctly or not. I didn't receive information as far as reviewing what other professionals were supposed to review on your behalf.
> Q. Did I sign up for Anger Management?
> A. My understanding was you signed up for a incorrect course that was not approved by the Judge.]
> RR Sup. 1, Vol. 005, P. 79, Lines 10-23.

47. On February 1, 2021, Molly filed for a new trial to address countless trial errors, and she filed for the trial court's recusal which was denied by operation of law because Molly did not meet the verification requirement. *See Motion to Recuse, CR1, P.969, and Motion To Strike Amended Trial Exhibits, To Set Aside Judgment, And For New Trial, 1101.*

48. On February 5, 2021, Molly filed an APO in Collin County on February 5, 2021 but never received a hearing. Molly attempted to resubmit the APO on February 10, 2021 which was rejected from the filing system on February 12, 2021,

just hours before Mark's APO was heard in an auxiliary court in cause, 366-50778-2021, (*Rejected APO, CR3, p. 15*).

49. Mark was previously reported to CPS in August of 2020 for negligent possession of firearms.

> [Q. And the initial investigation was regarding Mark Maldonado?
> A. Correct.
> Q. What were generally the allegations?
> A. Neglectful supervision as well with concerns of there being weapons in the home.]
> RR Sup. 1, Vol. 003, P. 44, Lines 18-23.

> [Q. Was there one bolted to the inside of the bed frame?
> A. I did not go under the bed.
> MS. JAMES: Objection; relevance.
> THE COURT: Objection is overruled. All right. So, I'm sorry, Ms. Day, did you say you did not observe one? Or what was the answer to your question?
> THE WITNESS: I was asked to -- I asked to see where the weapons were in the home and I was shown two separate weapons that were underneath the bed. I did not physically go under the bed myself to see if there were more than different types of places.]
> RR Sup. 1, Vol. 003, P. 50, Lines 3-23.

50. Molly's APO filed February 10, 2021, complained of Mark's history of abuse and threats involving Mark's 9mm Glock, CR3, P. 10, as well as instances of stalking during the pendency of the divorce.

> I've had to deal with private investigators. I've had to deal with people intimidating me, including three attorneys that have been harassing me, and him. I've had very little interaction with my children. When I have been allowed to call them, he records me

and them, and he stands over us trying to incite arguments and jump in.
RR Sup. 1, P. 107, Line 25 – P. 108, Line 7.

51. On February 11, 2021, Mark coerced Molly into meeting him for their daughter's birthday after he had been denying all contact for over a month.

Q. (BY MS. WILKERSON) Did Mark make any provisions regarding my attendance during the visit?
A. If -- the attorneys and Mark both said if you were show up or anything, that the visit will be terminated and the police would be called.
Q. Was I even allowed to drive anywhere near?
A. No.
Q. (BY MS. WILKERSON) So Mark did not want me anywhere near when you visited him just a few days before the birthday?
A. No.
Q. And then he insisted that we all meet for dinner a few days later?
A. Yes.
RR Sup. 1, Vol. 005, P. 110, Lines 1-25.

52. Molly contends that, on February 11, 2021, Mark approached and threatened her with a 9mm Glock as he pulled MCM out of her arms. Molly reacted with a lot of screaming and hysterics, Mark's mom called 911 alleging Molly was trying to abduct the children, and when prompted about the benefit of claiming he could not breath, Mark told the investigating officer that Molly had impeded his airway.

[Q. So you're in fear at Pappadeaux for your life?
A. Not until I was attacked.

Q. Were you -- so you weren't fearful when you approached me and Milanna outside by ourselves?
A. I never approached and Milanna by yourselves. This would be another lie.
Q. Did you have a nine millimeter on your hip that night?
A. Yes, I did.
Q. And you were scared of me?
A. As I said, not until I was attacked.
Q. Did you show me your nine millimeter when we were outside?]
RR Sup., Vol. 005, P. 85, Lines 6-18.

[MS. WILKERSON: It regarding just the standing orders of Collin County. Mr. Maldonado has not been -- it's not legal for him to approach me with a gun and threaten me with a gun.
THE COURT: It is legal for him to approach any person with a gun if he's licensed to carry that gun and can do so. Again, that has no basis on this. Whether or not you feel threatened by it is a whole separate issue, but it has not been determined by this Court and is not going to be determined by this Court. Mr. Maldonado is perfectly capable of owning a firearm. We live in Texas. People are able to have them. So what is your concern or what is your issue?
MS. WILKERSON: My issue is he approached me and my daughter with a gun when his protective order was issued and he threatened me with a gun.]
RR Sup. 1, Vol. 006, P. 110, Lines 2-25.

53. Mark had Molly arrested in front of their children when he had no apparent marks or injuries, there was one questionable witness, (claiming a few different versions of facts), despite a restaurant full of people; shoddy police work, "***And I kind of confirmed the events with him and he said, 'That's exactly what I saw*, sir" – (note: officer description of investigating/questioning sole witness to a felony charge),** RR Sup. 1, Vol. 005, P. 91, Lines 16-17**;** and there was no video

footage from the restaurant even though Mark testified at the final PO hearing that there was. *RR Sup. 1, Vol. 005, P. 95, Line 8 – P. 96, Line 4;*

> [Q. Okay. And did you see -- did you try to look for evidence of harm on Mr. Maldonado's body?
> A. Yes.
> Q. Did you see any kind of marks?
> A. No apparent injuries were seen.]
> RR Sup. 1, Vol. 005, P.92, Lines 20-24.

54. There was nothing to justify Molly's arrest except she was still in a state of trauma and shock from the pendency of divorce suit, final trial, and being kept from MCM and MAM. She was screaming "you will not take my children from me!!" -Mark did though - for over a year now - no contact; Mark was calm, collected, and in control.

> [Q. All right. So what exactly was she yelling or screaming from your recollection?
> A. From my recollection -- what I remember is she says, "You will not take my kids from me," is what she was saying.]
> RR Sup. 1, Vol. 005, P. 23, Lines 14-18.

> [Q. What was the demeanor of Mr. Maldonado that you recall?
> A. **Very calm.** No signs at all of intoxication or that he had been drinking. **Very sure of his story and what he was saying**.]
> RR Sup. 1, Vol. 005, P. 90, Lines 7-11.

(Note: Mark changed his story the next day to dazzle Collin County - *See Mark Declaration*, CR2, P. and *Police/Indictment Claim*, CR3,).

55. The next day Mark was given a 61-day EPO that left the children out, so Marks attorney, George, personally went on Mark's behalf on February 12, 2021, to obtain an ex parte PO that included MCM and MAM in the 366th District Court of "Dallas" County. *(CR2, P. 21 and RR Sup. 1, Vol. 005, P. 99-103*).

56. On March 3, 2021, the trial court held a quazi-criminal hearing, entered a final PO against Molly for Mark, but struck Mark's request to include the children as protected parties because the trial court has never found that that Molly endangered MCM or MAM. (CR2, P. 31). In fact, the trial court found that, because Molly was not following orders as alleged in Mark's ex parte pleadings- there was "no choice but to give Mark what he wanted." (RR Sup. 1, Vol. 006, P. 53, Lines19-23).

> [yes, I will grant you, most of those requests came from the other side, but that's because you kept having issues with following the Court's orders and I have no other option at that point then to follow the things that they want.]
> RR Sup. 1, Vol. 006, P. 53, Lines 19-23.

57. Immediately following Mark's final PO hearing on March 3, 2021, the trial court superseded the PO with Mark's proposed SAPCR orders that did not track what the trial court had rendered following final trial on January 27, 2021. Molly's possessory rights titled "JMC," transformed into de facto termination of the parent-child relationship characterized as possessory rights. (CR1, P.1247).

58. On April 5, 2021, Molly learned to serve her APO, and April 13, 2021, the day after Molly's underlying case was accepted by this Court for appeal, the application was used as grounds to place Molly on a public list as a vexatious litigant to limit her constitutional right to petition via the vexatious litigant statue. (CR1 366-53554-2020 p.1570; and CR1 366-53554-2020, p.1573). (See *Molly's APO, CR, P. 48* and Mark's *Motion to designate Molly as a Vexatious Litigant*, CR, p. 58)

59. Prior to filing this present divorce cause by and through an attorney, Molly had never sued anyone in her entire life. (Undisputed fact).

60. Due to the vexatious litigant designation, Molly was denied several opportunities to file pleadings necessary for the timely relief required in circumstances involving fundamental parental rights and the devastating consequences of severing such.

61. Relief was again delayed and when the trial court sustained the untimely, unjustified contest to Molly's indigency on June 25, 2021. Molly contends that her financial situation was obvious following Mark's relentless trial court harassment cost her a chance at adequate representation, all of the money she had saved, her job, her graduate school pursuit when she only had one remaining semester of practicum, and what's most devastating, over one year of precious moments with MCM and MAM.

[THE COURT: All right. Thank you. Ms. Wilkerson, do you wish to make any statements in regards to your inability to pay the court reporter's fees for the records in your matters that you have taken up on appeal?
MS. WILKERSON: Yes, sir. My initial affidavits in -- I guess it was November I filed one. I had a job at that time. I was a fulltime graduate student, and my income was roughly $1,300 a month net -- or gross, and I had a substantial amount of money that I received from school. But after three months of litigation and $43,000, I didn't have any of that money left, so $1,300 a month doesn't go very far. And then in February, after extensive litigation, I lost my job. I had to take a step back from graduate school because I was in practicum.]
RR, Hearing Rec., Vol. 001, p. 16, Lines 4-19

62. Molly has not seen her children's faces or heard their voices in over a year now and has not deserved this; MCM and MAM need their mom -these young children have not deserved this; this trauma has been so unjust, and the efforts and resulting deprivation of access is abusive to both Molly and the children.

[Q. (BY MS. WILKERSON) Okay. Did you observe any emotional or physical problems with the children?
A. Yes.
Q. And what were those?
MR. MALLERS: Objection; lack of proper predicate for him to render an opinion.
THE COURT: Overruled. You may answer.
A. Mainly with Milanna. She was very defiant, agitated, angry with Mark, and just frustrated with the overall -- the overall situation.]
RR Sup. 1, P. 109, Lines 1-11.

[I spent day in, day out with my children. Even in the evenings he was gone. My children fell asleep in my arms every night.]

IN THE INTEREST OF MCM AND MAM, CHILDREN
et al.

SUMMARY OF ARGUMENT

After intentionally tipping the scales such that Molly would be left defenseless against his abusive litigation tactics, Mark violated Molly's procedural due process rights to further tip the scales and bias the trial court which without ineffective assistance of counsel and a partial trial court, There would be no question as to the existence of the informal marriage, and the best interest of the children in the matter would be the primary concern.

When the trial court dismissed the matter of the marriage on trial-day-one, the SAPCR was also dismissed by rule of law. Mark was aware of this fact yet continued to trial on the SAPCR issues the next day. The trial court rendered restrictive SAPCR orders on January 27, 2021, and held a fifteen minute trial on a meritless visitation enforcement suit. Perhaps the trial court held SAPCR jurisdiction until March 31, 2021, when the trial court entered Mark's proposed final enforcement order which included income withholding and may or may not have allowed for further trial court jurisdiction.

Molly proved the facts of the existence of the informal marriage, the trial court found the facts and misapplied the law when ruling that there was no informal marriage based on the agreement prong.

Mark requested ancillary court relief on February 12, 2021 via an ex parte request for a PO. His temporary request was granted and final SAPCR order entry from the January 27, 2021 orders rendered following trial was delayed as was Mark's hearing for a final PO; both were rescheduled for the same date, March, 3, 2021.

Mark's final PO was granted and his proposed new final SAPCR orders were entered immediately after, which ultimately, granted the de facto termination of Molly's parental rights. Unbeknownst to Molly, the trial court did not have jurisdiction to enter either Mark's PO or his proposed SAPCR because the trial court had previously dismissed the SAPCR and the lawfully attached jurisdiction over MCM and MAM.

On March 31, 2021, the trial court entered an order sealing records in the underlying case, and thus retained jurisdiction over MCM and MAM.

Molly was unaware of the jurisdictional games at play, she filed what she thought could return her parental rights, she filed for a protective order, and following the acceptance of her cause into this Court's jurisdiction, Mark had Molly declared a vexatious litigant and attempted to impose a bond and keep her from the appeals that would expose the errors and misconduct that permeates this case.

IN THE INTEREST OF MCM AND MAM, CHILDREN et al.

GENERAL ARGUMENT

Issue #1. Structural Errors in this case and the associated cases, including ineffective assistance of counsel, fraud on court, and the impartiality of the trial court resulted in a fundamentally defective trial and unjust final order outcomes;

Issue #2. Procedural defects in this case and associated cases prevented Molly from defending herself from abusive litigation and presenting her case to the trial court.

1. These appellate causes are underscored with constitutional-structural errors which "have broad effects that not only reach forward to the outcome, but backward to the foundation of the case and inward (to its structure).[4] "Structural" errors, as explained in Arizona v. Fulminante,[5] is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."

[4] See Arizona v. Fulminante, 499 U.S. 279, 309–310 (1991).

[5]Id. at 309–10 ("The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. Each of these constitutional deprivations . . . affect[s] the framework within which the trial proceeds, rather than simply an error in the process itself.").

Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 1265, 113 L.Ed.2d 302 (1991). Molly had no rights to justice or to even be a mom, and the children in the matter, MCM and MAM, their rights were never a consideration.[6] To try to make sense of this case, to look at what happened, and to find the appropriate legal error for this Court's review is impossible because this case it is fundamentally flawed. To even sort through the hundreds of errors is burdensome and traumatic. One consideration for review would recommend reversal without even considering the harmless error review.[7] Another would promote this Court's use of the harmful error analyses which would determine whether the alleged errors probably caused the rendition of an improper judgment/s." *L.S.*, 2017 Tex. App. LEXIS 8963, 2017 WL 4172584, at *16.

See additional harmful errors as follows:

I. Attempts to hijack trial court and appellate court jurisdiction through the dismissal of an informal marriage divorce suit;
II. Discriminatory rulings based on a medical condition;
III. Tampering with drug test results / evidence;
IV. Exposure to loss of physical liberty when falsely deemed facts were used as a basis to prosecute in criminal court; and

6 "[T]he Supreme Court has held that some liberties are so important that they are deemed to be 'fundamental rights' and that generally the government cannot infringe upon them unless strict scrutiny is met,"

7 Fulminante v. Arizona, 499 U.S. 279, 307–12 (1991) "As for those constitutional errors that remained per se reversible without a finding of harmlessness – such as violations of one's right to counsel, or one's right to be tried before an impartial judge – those errors cannot simply be assessed in the context of other evidence. Instead, those are structural defects that affect the constitution of the trial mechanism, which defy analysis by 'harmless error' standards."

V. Further subjection to loss of liberty via the unconstitutional vexatious litigant statute.

See also, RR Sup. 1, Vol. 006, P. 16, Line 1 – P. 17, Line 9.

> [THE COURT: See, again, there -- where -- where we're running on the issue here, you don't necessary have a right if you can't follow the orders of the Court.
> MS. WILKERSON: I can.
> THE COURT: And so that's where the issue comes in.
> MS. WILKERSON: I can follow your orders, sir.

2. Any given volume of the records before this Court is reflective of abuse of process and an abusive process which can hopefully be a consideration in reviewing and deciding these appeals. As for harm, the harm in this case and associated cases is irreparable, undefinable, and endless. "Termination of parental rights is traumatic, permanent, and irrevocable." M.S., 115 S.W.3d at 549.

> [When someone spends $124,000 and three attorneys to try to take my children, everything concerns me.]
> RR Sup. 1, Vol. 004, P. 19, Lines 5-7.

3. The procedural deficits in this case/s are obvious on face. The lack of service of pleadings for a "temporary" change in conservatorship on January 6, 2021 was concealed in Mark's second unnecessary writ request -deceitfully titled to appear as though Mark's first request had been granted on November 20, 2020. The first vexatious writ request was found in Molly's favor. This second writ request was ex parte, denied, and deemed unnecessary, yet it biased the trial court just three weeks later at final trial. The claims that Molly had a "willful disregard for orders of

the court" reverberated when the trial court presided over trial on January 26, 2021 and January 27, 2021. See biasing ex parte motions, CR1, P. 681 and CR1, P. 1112. Molly did not know of the January 6, 2021 claims asserted until obtaining records for appeal in May of 2021, and consequently, she had no chance to defend herself.

4. The trial court lost jurisdiction when it dismissed the divorce suit because the SAPCR attaches to the divorce. Following the dismissal of the divorce, each and every action in this case and associated cases was an abuse of discretion. See In the Interest of C.M.V., 479 S.W.3d 352 (2015): the 65th District Court did not enter a final order and dismissed the divorce action which consequently resulted in loss of jurisdiction over the SAPCR because, by law, the SAPCR attaches to the divorce, and the two causes cannot be severed. See Tex. Fam. Code Ann. § 155.001(b)(1); "providing that a voluntary or involuntary dismissal of a suit affecting the parent-child relationship does not create continuing, exclusive jurisdiction."

IN THE INTEREST OF MCM AND MAM, CHILDREN et al.

ARGUMENT – I

MATTER OF THE MARRAIGE

Issue #3. The trial court misapplied the law when it found that no formal marriage existed based on the agreement prong;

Issue #4. The trial court abused its discretion when it declined to address Molly's additional claim of putative spousal right.

Favorable Presumption

1. Following the August 4, 2020 bifurcation of the divorce cause from the SAPCR, Molly had to prove standing to proceed with the divorce suit. Mark and Molly lived together for 14-years in a committed relationship with no other marriages and no children with other partners to cloud the one and only relationship they intended to share in for the rest of their lives. Prema facie was met for standing at temporary orders hearing on August 12, 2020; otherwise, the divorce suit would

not have progressed. "Standing is a threshold requirement to maintaining a lawsuit." Farmers Tex. Cty. Mut. Ins. Co., 598 S.W.3d at 240 (citing Heckman v. Williamson Cty., 369 S.W.3d 137, 150 (Tex. 2012)). "After some evidence of a prior and continuing marriage has been introduced, the weight of such evidence must be determined by the finder of fact. Davis v. Davis, 521 S.W.2d 603 (Tex.1975); Woods v. Hardware Mut. Casualty Co., 141 S.W.2d 972 (Tex.Civ.App.Austin 1940, writ ref'd). See O. Speer, Texas Family Law §§ 1:46, 5:90 (5th ed. 1975); 38 Tex.Jur.2d Marriage §§ 44-46 (1962); Note, Evidence-Sufficiency of Evidence to Rebut Presumption of Validity of Second Marriage, 1 Baylor L.Rev. 203 (1948).

2. Mark does not deny the history between him and Molly other than the act of marriage itself, nor does Mark dispute the fact that Molly's commitment to their life together as a family including a near 5-year period where Molly's household contribution was raising their children. Molly's limited income production during that period does not overshadow the vital role she fulfilled in nurturing and caring for MCM and MAM and seeing to their safe and happy existence during their most fragile, formative years; nor should Molly's contribution to their household and family be faded from memory when Molly sat her career aside and upon reentry, for the first time ever, Mark had to step up to the plate as a father while Molly attempted to regenerate the relevance of her work experience and university education by teaching in a reduced-pay, sub-standard setting. Mark does

not get to erase Molly's role as a loving mother from his memory or the memories of their children; Mark does not get to take motherhood from Molly; that's one thing he can never afford. "Marriage, whether ceremonial or common-law, is proved by the same character of evidence necessary to establish any other fact." Stafford v. Stafford, 41 Tex. 111 (1874); O. Speer, Texas Family Law § 5:89 (5th ed. 1975). "Thus, proof of common-law marriage may be shown by the conduct of the parties, or by such circumstances as their addressing each other as husband and wife, acknowledging their children as legitimate, joining in conveyances as spouses, and occupying the same dwelling place." Bonds v. Foster, 36 Tex. 68 (1871); O. Speer, supra § 5:89; 38 Tex. Jur.2d Marriage § 42 (1962).

> [So my first year of teaching, did I get rookie of the year?
> A. Yes.
> Q. So you signed this document (pointing) as well?
> A. Yes.
> Q. Do you think I deserved that?
> A. Yes. Your colleagues voted for that.
> Q. Did I teach 12 subjects at the end of that year?]
> RR Sup. 1, Vol. 004, P. 92, Lines 18-25.

> [Q. Yes, ma'am. Was an insane amount of pressure
> put on me at that school?
> A. Yes.
> Q. Was I senior sponsor?
> A. Yes.
> Q. Was I Spelling Bee sponsor?
> A. Yes.
> Q. Was I student counsel sponsor?
> A. Yes.
> MS. WILKERSON: No further questions, Your Honor.]

RR Sup. 1, Vol. 004, P. 93, 6-16.

The Matter of Marriage as a Matter of Fact

3. Despite the procedural and structural defects in this case, the trial court did in fact find the facts necessary to establish the existence of the informal marriage. "The existence of a common law marriage is a question of fact," Dalworth Trucking Co. v. Bulen, 924 S.W.2d 728, 735 (Tex.App.--Texarkana 1996, no writ). Direct evidence proves the matter of the marriage in this case as well as circumstantial evidence, "as in other areas of law, a given fact may be established by circumstantial evidence where it may be reasonably inferred from other facts. Marriage, whether ceremonial or common law, although the character of the evidence might be different, is proved as any other fact might be proved." Tompkins v. State,774 S.W.2d 195, 209 (Tex. Crim. App. 1987)(en banc) cert. granted 486 U.S. 1004, amended, 486 U.S. 1053, 490 U.S. 754 (1989); Russell, 865 S.W.2d at 933.

4. The trial court misapplied the law when it found that no formal marriage existed based on the agreement prong. The fact finder found the undisputed facts that Mark and Molly lived together as a family and had children together. Further undisputed facts would show the couple shared in and built a life together for 14-years before Molly filed for divorce. *See Lovell*, 754 S.W.2d at 302 (citing *English v. Fischer,* 660 S.W. 2dat 524 (Spears, J., conjuring), "in which the special relationship necessary to create such a duty of good faith and fair dealings

arises either from the element of trust necessary to accomplish the goals of the contract or has been imposed by the courts because of an imbalance of bargaining power." Mark's mere denial of the informal marriage does not overcome the 14 years the two shared their lives together. See also, Ford v. Freeman, 2020 WL 521084 (N.D. 13 Tex. Jan. 16, 2020) "holding that same-sex couple had established a common law marriage based on their 24-year relationship," and see "an implied-in-fact contract arises from the parties' acts and conduct." Stewart Title Guar. Co. v. Mims, 405 S.W.3d 319, 338 (Tex. App.— Dallas 2013, no pet.). In fact, even in his attempts to deny the nature of their commitment, Mark himself admitted to such when he testified to his plans that "he wanted to be able to get us in another house at some point;" (RR Sup. 1, Vol. 002, P. 73, Lines 13-19); thus, Mark himself testified to his intent. Furthermore, in raising their babies together, carrying thirty-year life insurance policies, holding out as beneficiaries on all accounts, sharing a financial account, spending their holidays together, attending social functions together, renovating their home together, there should be no question about Mark and Molly's intentions.

> [THE COURT: Okay. Given the information that was presented, the arguments of parties, I think the only thing that wasn't raised, or at least with a scintilla of evidence to proceed beyond a directed verdict at this point in time, was **the issue of agreement**]
> RR1, Vol. 002, p.4, Lines 4-Court:

5. This Court affords great deference to the trial court's findings, and the trial court found the requisite facts to establish all but the agreement prong**. The law was misapplied when Molly's informal marriage was denied based on the agreement prong.** "Concerning the 1989 amendment, the court of appeals stated that regardless of the amendment of sec. 1.91(b), an agreement to be married may be inferred from directly or indirectly;" Case law has well established the agreement prong is sufficiently met by establishing the other two prongs: holding out and living together as a married couple. "The agreement may be expressed or implied; no words are required." Carson v. Kee, 677 S.W.2d 283, 285 (Tex. App. -- Fort Worth 1984, no writ); "An agreement to be husband and wife may be implied and need not be inferred from evidence establishing the other requisites of a common law or informal marriage." Grigsby v. Grigsby, 757 S.W.2d 163, 164 (Tex. App. --San Antonio 1988, no writ); Reilly v. Jacobs, 536 S.W.2d 406 (Tex. Civ. App. -Dallas 1976, writ ref d nre.).

Res ipsa loquitur

6. Where facts are established, intent proves the law. The trial court established the facts for two of the three prongs which, as is well established in law, could very well establish the agreement prong in-and-of-itself. Further, the trial court clearly states in his highly regarded opinion that the only issue in proving the legitimacy of the informal marriage, "was the issue of agreement." As previously

stated, Mark and Molly's intentions were clear, "[A] party's intent is determined at the time the party made the representation, [but] it may be inferred from the party's subsequent acts after the representation is made." Spoljaric, 708 S.W.2d at 434 (citing Chicago, T. & M.C. Ry. Co. v. Titterington, 19 S.W. 472, 474 (1892)); and Mark and Molly's intentions can be further demonstrated by their character:

> [The only things I really heard about him was that he likes money and cares about money. I don't know that that's necessarily a disqualification from being a parent or doing any of those kinds of things.]
> RR1, Vol. 004, p. 4, Lines, 20-24

> [And I was acting in the best interest to leave in the first place, and I don't regret that. I regret my children having to go through this, but I --I -- honestly, I had to leave him. And I haven't drug him through hell to allow you to arrive at that conclusion. You can just make that conclusion on your own, Your Honor.]
> RR Sup. 1, Vol. 004, P. 148, 1-7.

7. Res ipsa loquitur – their relationship speaks for itself. Molly had multiple people testify to the legitimacy of Mark and Molly's informal marriage: a friend that spent time with them as a couple testified that she had heard Mark refer to Molly as his wife; she provided further testimony that she was aware of the ceremony, she was shown the wedding bands and knew that Molly was excited to be married; another witness testified that he heard Mark and Molly refer to each other as husband and wife; Molly testified to purchasing cars together and having 30-year life insurance policies; Molly explained to the trial court that she agreed to the informal marriage, she explained the circumstances that justified the informal

setting, and she presented exhibits: she submitted a photo of her and Mark wearing their wedding bands after informally swearing matrimonial vows to each other; Mark confirmed the date and location of the informal wedding; he also submitted business records from his employer into evidence that included requests for FMLA leave "to care for a spouse" following Molly's c-section births of their children; Molly's father testified that he put his own time and money into significant renovations on their marital home, and he testified to a photo he had posted of his daughter and "son and law." Evidence clearly and convincingly rose beyond the preponderance standard which, by law,[8] (RR Sup. 1, Vol. 004), establishes the informal marriage. CR1, p. 824: see Eris, 39 S.W.3d at 714; see also Martinez v. Furmanite Am. Inc., No. 04-17-00318-CV, 2018 WL 4469973, at *5 (Tex. App.—San Antonio Sept. 19, 2018, pet. denied) (mem. op.) "(concluding that evidence of a fact issue existed where alleged wife testified that there was an agreement to be married and presented evidence that alleged husband treated her as his wife)."

> [My circumstance is not of woman that sought illegitimate rights after a few years of living together. My circumstance is that of a woman that wholeheartedly believed that this man vowed to me upon that phase of our lives together in which we built a family.] RR Sup. 1, Vol. 002, Pg. 174. Lines 8-13.

[8] The law recognizes a common-law marriage, but a common-law divorce is unknown to Texas law. The marriage arises out of the state of facts; but once the common-law status exists, it, like any other marriage, may be terminated only by death or a court decree. Once the marriage exists, the spouses' subsequent denials of the marriage, if disbelieved, do not undo the marriage. De Beque v. Ligon, 292 S.W. 157 (Tex.Comm'n App.1927, holding approved).

Putative Spousal Rights

8. Molly raised the issue at trial, she raised the issue in her brief prior to trial, and she later submitted a request to the trial court to reconsider her putative spousal rights: CR1, p. 1362. “Any time there is a claim for a common law marriage, it will be important to also consider the concepts of a putative marriage.” Dean v. Goldwire, 480 S.W.2d 494 (Tex. Civ. App. - Waco 1972, writ ref’d n.r.e.); “A putative spouse has all the rights, incidents and privileges pertaining to a legally valid marriage, including the right to an equitable division of all property acquired during the relationship in a suit for divorce or in a suit to declare a marriage void.” Padon v. Padon, 670 S.W.2d 354, 356 (Tex. App. -San Antonio 1984, no writ). The trial court would not hear Molly’s additional claim for putative spousal rights; therefor, the claim is not before this Court. The "putative marriage doctrine" is used in Texas courts to correct an injustice which might otherwise occur if a marriage is believed to be valid by one or both parties but is deemed void. The doctrine works as a protective mechanism for innocent persons. “The critical distinction is that the marriage itself is not rendered valid, rather, the doctrine allows the innocent party certain property rights in the estate created during the relationship.” Davis v Davis, 521 S.W.2d 603 (Tex.1975). The trial court erred when it denied Molly the right to adjudicate her claim to putative spousal rights and once again denied a necessary request to protect against injustice. This is a reversible error because it probably

prevented Molly from properly presenting the case to the court of appeals, (See Tex. R. App. P. 44.1(a)(2)), because this Court cannot consider Molly's putative spousal rights, you can however consider the denied request for such. Almeida v. Estrada, No. 04-05-00255- CV, 2006 WL 2818067, at *2 (Tex. App.—San Antonio Oct. 4, 2006, no pet.)

> [MS. WILKERSON: Your Honor, did he - - did he - - did I believe it is the other question. So on the other issue I raised with a putative spouse, did I believe that he had an agreement? Did he present himself as though - -
> THE COURT: So at this point in time, Ms. Wilkerson, the ruling of the Court has already been entered. You are welcome to appeal that ruling if you wish. All right?]
> RR1, Vol. 002, p. 5, 4, Lines 21-25, 1-3

Informal Marriage Conclusion

9. It is without a doubt a sad event, divorce, especially when there are young children involved; It is even understandable that Mark would feel animosity for Molly's decision to end the marriage, but the law is not based on Mark's feelings, nor is it based on facts surrounding the manner at which the marriage ended. The relevant facts here establish that Mark and Molly agreed to be married, lived together as a married couple, and held themselves out as a married couple. No amount of money spent to avoid the truth can reconstruct the undisputable and undeniable facts.

This court should not only consider the facts, but you should also consider the extensive structural and procedural defects that Mark invited into this case/s as well -which probably caused the rendition of improper judgments. See Tex. R. App. P. 44.1(a)(1). If Mark could have disproved the existence of the informal marriage, he would not have felt the need to keep Molly from a fair trial. The matter of the marriage should undoubtedly be reversed, rendered valid, and remanded for the trial court to address terms for a final decree of divorce and more importantly, to address SAPCR related issues; however, if this Court disagrees, it is settled in law that a trial court abuses its discretion when it fails to consider all claims set forth. Whereas here, when the trial court declines to hear additional claim of putative spousal rights, the appropriate action is to remand to the trial court for further consideration. Reverse and render is however more consistent with this present case. "Where the challenging party conclusively proves he has established the point as a matter of law, the appropriate remedy is reversal and rendition of judgment." Marincasiu v. Drilling, 441 S.W.3d 551, 557 (Tex.App.—El Paso 2014, pet denied).

"the next phase of the trial will determine

basically the parent- child relationship and the custody of

the children of this marriage.

The burden at this point in time will shift to the

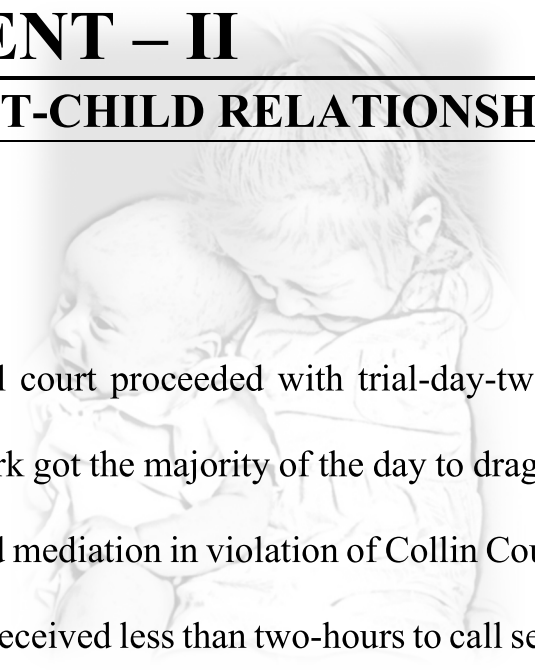
Respondents in this case."

(RR1, Vol. 002, p.5, Lines 4-7)

IN THE INTEREST OF MCM AND MAM, CHILDREN et al.

ARGUMENT – II

SUIT AFFECTING PARENT-CHILD RELATIONSHIP



Procedural Due Process - SAPCR

1. On January 27, 2021, the trial court proceeded with trial-day-two to address the custody of the children, and Mark got the majority of the day to drag out irrelevant testimony despite having canceled mediation in violation of Collin County Local Rules in October of 2020, and Molly received less than two-hours to call seven witnesses. RR Sup. 1, Vol. 003-004.

Fraud on Court

2. At trial on January , 2021, Claire failed to disclose the lack of the MRO report and the inconsistent chain of custody, Claire tampered with evidence by detaching the MRO report from one of the September 2020 follow-up drug tests, and she tried to avoid the hair strand test Molly took the week before trial to defend herself from the harassing, discriminatory allegations associated with medication Molly takes for a learning disability. (Judicial notice requested of April 14, 2022, *Appellant's Motion to Strike*).

[BY MS. WILKERSON:
Q. Ms. Day, did they make you aware the doctor's note that I had?
A. You made me aware of it.
Q. Okay. Are you aware that Adderall is a DEA controlled substance?
A. I'm aware that it is an amphetamine, yes, I am.
Q. So are aware that I have to take a drug test every three months to even obtain that prescription?
A. You did not make me aware of that, but that is common.
MS. WILKERSON: No further questions, Your Honor]
RR Sup. 1, Vol. 003, P. 55, Line 17 - P. 56, Line 4.

3. When Claire could not make the manufactured drug allegations seem legitimate, she told the trial court that the order on Mark's *Motion for Sanctions*, *CR. 1, P. 757.*required that Molly's drug tests be deemed positive when in reality, the trial court had denied the request. See CR1, P. 757.

MS. JAMES: I'd ask the Court to take judicial notice of the Proposed Parenting Plan filed with the Court.
THE COURT: You said there was an amended one?
MS. JAMES: Yes, Your Honor. It was filed today. It's been accepted, but I can send it to everyone if you would like.
THE COURT: I see it. I just want to make sure that Ms. Wilkerson -- was she served with it as well?
MS. JAMES: Yes, Your Honor.
MS. WILKERSON: **Your Honor, I was really disturbed by the first one they sent, so I would be anxious to see this one. I have not.**
THE COURT: Okay. Was she e-mailed?
MS. JAMES: It was served via e-file yesterday, so she should have received an e-mail. But I can send it by e-mail as well.
MS. WILKERSON: What time was that, Ms. James?
MS. JAMES: I'm sorry?
THE COURT: Okay. Remember that I'm in charge of the courtroom. Right?]

Equal Protection

4. Molly's 14th Amendment equal protection rights were violated when the trial court permitted Claire James, a former CPS attorney, to use CPS protocol to entrap Molly into the de facto termination of her parental rights without affording Molly the safeguards other indigent parents receive when faced with CPS suits filed by government entities. *See Claire's Offensive, Unsubstantiated Opening Testimony / Argument, RR Sup. 1, P. 12, Line 16 – P. 15, Line 19,* and more of her harassment via CPS scripts as follows:

> [We are going to request that the possession be supervised for the first three months by Hannah's House or another supervision facility while Ms. Wilkerson does random drug and alcohol testing. We're going to ask that she attend anger management, attend therapy, attend a parenting class **similar to what you might see in a CPS case**]
> RR Sup. 1, Vol. 003, P. 14, Lines 18-24.

> Q. (By Ms. James) Ma'am, you haven't seen your kids since January 7th, right?
> A. No.
> Q. And that's because on that day this Court ordered that your possession was suspended, correct?
> A. Correct.
> Q. And because you took the children when it was not your possession time on January 6th, 2021, correct?
> A. Correct.
> Q. And you also failed to surrender possession of the children on the Friday before Christmas break, which was December 18th, 2020, correct?
> A. I'm sorry. Can we start over?

Q. Ma'am, you also failed to return the children at school on the 18th of December --
A. No.
Q. -- in the morning, correct?
A. No.
Q. And on the 20th of November, you failed to surrender possession of the kids again at school?
A. No.
Q. Correct?
A. No, incorrect.
Q. You attended the pre-trial hearing in this matter on 1/20/2021, right?

MS. WILKERSON: Objection, relevance.
THE COURT: I'm sorry?
MS. WILKERSON: Objection, asked and answered.
THE COURT: Overruled. Please answer the question.
A. State the question again.
Q. You recall that Judge Nowak responded that your conduct prevented you from seeing your kids, right?
A. I don't recall his exact words.
Q. Ma'am, do you think that you need help?
A. No, I don't.
Q. So all these drug tests are fake, right?
A. Are you kidding?
MS. JAMES: I withdraw the question, Judge, and pass the witness.
RR Sup. 1, Vol. 004, P. 114, Line 1 - P. 115, Line 25.

5. Furthermore, Tex. Fam. Code § 107.013 and 263.0061 are violations of Molly's equal protection rights as they provide safeguards for similarly situated parents facing denied parental rights yet there was no such allowance for Molly in this private party case;[9] -see In re. J.R. and I.R., No. 11-16-00203-CV (Tex. App.—

[9] The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a directive that all persons similarly situated should be treated alike. U.S. Const. amend. XIV, 1; City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 3254 (1985)

Eastland Jan 17, 2017, no pet.) (mem. op.); "Given these circumstances, and absent a dispute that Mother truly is indigent, noncompliance with section 263.0061 was not harmless and reversal is required" … "Parents face a complex and nuanced family-law system that is challenging to navigate without the guidance of counsel." Considering the importance of the fundamental rights at issue, "the Legislature has adopted important safeguards in sections 107.013 and 263.0061 to help ensure parents will not be deprived of their parental rights without due process of law." See also Tex. R. App. Proc. § 28.4; and Tex. R. Jud. Admin. § 6.2(a), "Because these appeals involve fundamental rights that necessitate expedited consideration…" Molly's fundamental rights as well as MCM and MAM's rights are NOT of any less importance.[10]

Mathews v Eldridge and Lassiter

6. Regardless of who initiates the lawsuit, the government or a private party, it is the trial court acting on behalf of the state who enters the order, and Molly, MCM, and MAM are equally being subjected to irreparable harm without the same equal safeguards provided to indigent parent in a CPS suit. The trial court should have appointed an attorney for Molly. See: "in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of

[10] See United States v. Morrison, 449 U.S. 361, 364 (1981). Absent the effective assistance of counsel, "a serious risk of injustice infects the trial itself."

error were at their peak, the Eldridge factors would overcome the presumption against the right to appointed counsel, and due process would require appointment of counsel." Mathews v. Eldridge, 424 U.S. 319 (1976); also see Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981). The Court held parents have a due process right to a fundamentally fair procedure that may require the appointment of counsel.[11] The law should have at least required the appointment of counsel for the children. See Tex. Fam. Code § 107.013.[12]

> THE COURT: You think that, again, all these things, mainly your desire to see your children, is, again, something that's just going to wash away everything that's happened in the last year?
> MS. WILKERSON: No, Your Honor. I have a right to see my children.

Judicial Impartiality

7. Following Mark's ex parte pleadings to change conservatorship on two different occasions, (CR1 Sup., P. 1112 and CR1, P. 681), the trial court's frustration with Molly echoed the claims stated in the pleadings. Additionally, the way Mark and his attorneys received preferential treatment and the way the trial court disregarded Molly's rights and spoke to her like she was a spiteful, misbehaving

[11] Tex. R. App. P. 44.1(a) (requiring, for reversal, that an appellant show that the trial court erred and that the error probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to this court).
[12] [In a suit filed by a governmental entity under Subtitle E in which termination of the parent-child relationship or the appointment of a conservator for a child is requested, the court shall appoint an attorney ad litem to represent the interests of an indigent parent of the child who responds in opposition to the termination or appointment.

child, and the overall sum of errors in this case also lend to the fact that the trial court was bias against Molly, and this structural error is ever-present in this case. Bias was clear to anyone witnessing trial including Molly as well as Mark and his attorneys who reveled in the opportunity to personally taunt and harass Molly throughout the proceedings even having her "deemed" an illicit methamphetamine user by way of default and fraud. Caperton v. A.T. Massey Coal Co., (2009) (quoting In re Murchison, 349 U.S. 133, 137 (1955)): "The United States Supreme Court has concluded that "a fair trial in a fair tribunal is a basic requirement of due process

> [And the reason why you do not get to see the children is because you cannot follow simple directions as also evidenced by the fact that you would continually e-mail me directly.]
> RR Sup. 1, Vol. 005, P. 162, Lines 22-25.
>
> And the fact that you couldn't follow
> these simple instructions is what's happening.]
> RR Sup. 1, Vol. 005, P. 166, Lines 6-7.

Because "You Can't Listen" is NOT Rebuttal Presumption

8. See below, the trial court's reasoning for denying the presumption of JMC following final trial on January 27, 2021 echoes the ex parte claims that Molly cannot follow orders. After keeping her kids from her from January 6 – through, (at that time), January 27, 2021, the trial court was going to punish Molly further by

denying her standard possession, taking away expanded holidays, and keep them from her longer while she jumped through precedent condition hoops for violating orders ONCE -she kept the children overnight on a evening that was not hers because the children were crying BECAUSE they watched their father's dog MURDER another dog in front of them. Molly was never served the pleading to know what the claim was, but clearly, it had a prejudicial effect. See Chester, 357 S.W.3d at 107.(2011), in which Chester was not served and had no reason to be prepared to present evidence in his defense or to rebut Vasquez's testimony .

> MS. WILKERSON: Your Honor, with all due respect to you, I just did that and they're calling it lies, so I would like another source.
> THE COURT: They didn't call it lies, ma'am, and I didn't take it as such. I'm not discounting your presentation of your drug test or anything like that. Okay. They said nothing about the drug test that you presented.
> RR Sup. 1, Vol. 004, P. 170, Lines 10-17

> [With that being said, Ms. Wilkerson, I believe that there is some issue that you may have with regard to, as you called it, being sassy with the rules or just having problems with people telling you what to do, and this Court has experienced that behavior. And for that reason, there is a lot of concern on my part that a lot of these orders that I may make may not be followed and may cause issues because one person is gonna decide that they don't want to follow the rules, they're not right, or they decided the kids were whining too much and it's not good to take the kids home, even though that's what the Court ordered, because they were crying and that's tough for somebody to do. Those are the kinds of things that give me pause and make me wonder about what I should order and how I should order it, it's those kinds of actions.]
> RR1, Vol. 003, *Memorandum Ruling.*

MS. WILKERSON: So one day — one day on January 6th, 1/6 of 2021 — one day of keeping my children can keep them from me for over — it's going to be two and a half months?

THE COURT: Okay. Ms. Wilkerson, so what I'm going to advise you at this point in time is make sure you understand. You seem to have trouble, again, following simple instructions and understand what's going on because you think you are entitled to or deserve something that's not allowed."

RR2, Vol. 002, p. 11, Lines 12-21

Mark's time check vs. Molly's time check:

How much time do you think you'll need,
Ms. James, in regards to this half of the case?
RR Sup. 1, Vol. 003, P. 8, Lines 10-11.

And

MS. JAMES: Your Honor, how much time do I have, please?
THE COURT: You still got about an hour and 17 minutes according to my clock.
MS. JAMES: Thank you, Judge.]
RR Sup. 1, Vol. 003, P. 81, Lines 4-9.

And

MS. JAMES: Your Honor, could I have know how much time we've used, please?
THE COURT: You've got 30 minutes left. 32 and 10 seconds.
MS. JAMES: Thank you, Your Honor.
THE COURT: All right. Again, we're going to break until 1:30. Court's in recess until that time and then we'll be back on.

VS.

[MS. WILKERSON: How much time does she have left, you Honor?
THE COURT: It's irrelevant. Why do you need to know how much time she has left?

Sealing Jurisdiction

9. On January 27, 2021, Molly was denied procedural due process when she was restricted from defending herself at a last-minute enforcement hearing following final SAPCR trial. When Molly tried to present her counter-petition, she was denied the opportunity, yet the trial court insisted the attorneys testify to assess fees against Molly for having to defend against the unpresented motion. It is possible that the trial court was aware that the case was dismissed the previous day at trial, January 26, 2021 and the enforcement suit could have served to retain jurisdiction over the children when it was left pending until March 31, 202, at which time Mark's attorney, George, finally submitted the proposed order for entry just before requesting the sealing of the case records. The seal upon the records then served as the sole means of establishing the trial court as the court of MCM and MAM's continuing jurisdiction.

> My children had been witness to their dog breaking loose and killing another dog, and I was not allowed -- I was notified via a social media post that had --
> MS. JAMES: **I would object, Your Honor, that this is outside of the scope of the evidence.**
> THE COURT: **All right. Ms. Wilkerson, again, limit your testimony -- or excuse me, your argument to what's been presented with evidence.**
> RR Sup. 1, Vol. 004, P. 134, Lines 14-22.

> Counter-claim. Ms. Wilkerson --
> MS. JAMES: Your Honor, I would object to any mention of a counter-claim because it is not properly before the Court.
> THE COURT: All right**. So any discussion with regard to that, Ms. James, are you prepared to present with regard to attorney fees?**
> **MS. JAMES: Yes, Your Honor.**
> THE COURT: All right.
> RR Sup. 1, Vol. 004, P. Lines 6-14.

10. After Mark's first protective order hearing took place on February 24, 2021,[13] the trial court and OC acted as though final orders were never rendered following trial. Molly attempted to explain that she had a standing APO and that Mark's claims were barred by res judicata.

> [MS. WILKERSON: There was orders rendered at trial, so it's not one way or the other, we can have - -
> The Court: There was nothing rendered at trial ma'am. There were the things that I ordered actually through the transcript, but there was no final order signed by this court so there's no paperwork.]
> RR3 Vol. 002, p. 15, Lines 19-23

11. The trial court had ex parte knowledge before the Zoom hearing started on February 24, 2021, the day Mark chose for his final PO hearing. The trial court had decided prior to starting the hearing that it would need to swear in Mark's witness and reschedule the SAPCR order entry and PO for the same exact day, March 3, 2021. There was also ex parte knowledge that Mark would have an

[13]Extrinsic fraud is "wrongful conduct practiced outside of the adversary trial - such as keeping a party away from court, making false promises of compromise, denying a party knowledge of the suit - that affects the manner in which the judgment is procured." Ince, 58 S.W.3d at 190.

"officer" testify at the rescheduled final PO hearing. This had happened before as well, on January 26, see RR Sup. 1, P. 17, Vol. 002, Lines 3-11.

> [All right. And, Mr. Mallers, I believe you wish to swear in a witness? Is it the officer?
> MR. MALLERS: It's an employee of Pappadeaux restaurant and I don't know if he's in the waiting room or not.]
> RR2, Vol. 001, P. 4, Lines, 21-25.

12. Molly stated at the March 3, 2021 hearing that there was no modification suit on file, "A party whose rights and duties may be affected by a suit for modification is entitled to receive notice by service of citation." Tex. Fam. Code § 105.003(b) (West 2014) (providing for notice to parties whose rights and duties may be affected). Mark was allowed to plead claims not previously presented, and orders were entered that wholly failed to track the final judgement rendered without any new trial or petition to modify, and Molly was previously led to believe that she would not be allowed to present evidence.

> [MS. WILKERSON: So we're basically - - we're allowed to present new evidence at this new hearing on the 3rd?
> THE COURT: No, Ma'am.
> MS. WILKERSON: Okay.]
> RR2, Vol. 002, p.17, Lines 17-21

> [We're - - we're not looking at modifying. They don't even have any motion on file to modify. And according to other law that I have researched an EPO and an appeal are not appropriate for changing conservatorship. Like I said, there's no suit for modification even on file.]
> RR2, Vol. 003, p. 15, Lines18-23.

Conditions Precedent – Unaffordable and Unperformable

13. Because Mark's counsel, Claire James, was formerly an attorney for DFPS,[14] she was well aware of ways to misrepresent reality and the burdensome "CPS" standard restrictions that would be financially and functionally impossible to perform. Molly's parental rights were conditioned on unaffordable and unachievable precedent conditions, and ultimately, Mark's approval. Financial roadblocks - including unaffordable reporter's records- which impede fundamental liberty interests such as the parent child bond which is a particularly well-established violation of equal protection rights.[15] Molly could not afford a 5k retainer for the psychological evaluation, and along with the non-operational visitation center that her visitation was restricted to Non-operational visitation site, Hannah's House. was not possible within the two-week time frame provided in the order. (see Final SAPCR Order, CR1, p. 1247). Further, Molly's rights were conditioned on Mark's approval because he could simply claim that Molly was not complying, Molly's parental rights were de facto terminated.

[14] "Claire, a former Child Protective Services worker, understands the financial and emotional cost of litigation -- especially when children are involved." https://www.cowlesthompson.com/attorneys/claire-e-james/

[15] M. L. B. v S. L. J. (1996) [is illustrative of cases that have applied heightened scrutiny to financial roadblocks imposed by states that stand in the way of indigents getting equal access to justice with respect to issues that substantially affect liberty or family life. In M. L. B., the Court strikes down a Mississippi law that prevented an indigent mother from appealing a termination of parental rights order because she could not pay a $2000 transcript-processing fee. The deprivation involved (a complete severing of parent-child bonds), Justice Ginsburg wrote for the Court, is "devastating" and heightened scrutiny is justified. The modest cost savings to the state resulting from the mandatory fee is not a sufficiently compelling reason to impose the burden that Mississippi's law did.]

[MS. WILKERSON: Your Honor, it's not possible. It's not possible because Hannah's House is not accepting new people. Dr. Albritton costs $5,000 to start. I do all my drug testing. I have done all of my drug testing. I have been following all of the orders. I have been - - going above and beyond and I - - genuinely don't disregard you.]
RR3, Vol. 001, p.9, 10-16

[And, yes, I will grant you, most of those requests came from the other side, but that's because you kept having issues with following the Court's orders **and I have no other option at that point then to follow the things that they want.]**
RR3, Vol. 001, p.15, Lines 4-25.

[MS. WILKERSON: Have you looked at the order?
THE COURT: I have read the order and signed the order. Are you -- do you think I just sign things? Who do you think reviewed that? Who do you think decision is that?

MS. WILKERSON: So you know that it's up to Mr. Maldonado to contact Hannah's House and make it possible for me to -- to work my visitations? And he hasn't done that. And one of the things I did file was to enforce visitation. I -- I want -- these are my kids. Like, they are suffering and they're hurting the most. And that's why I'm desperate. Like, I'm desperate to protect my children and just be there for them. They're wondering where their mom is. They're wondering what's going on.

And I've -- I've done all -- they continue to say that I don't do things but I've done all my drug testing. I'm in counseling once a week. I go to counseling one time a week and I wasn't even ordered to do that. I -- just when I do finally get to see my kids, I don't want all this sadness to just come out so I address that in therapy. And I'm doing my drug testing. Everything that I can that's in my power to do and I -- I just feel like it is -- I mean, I can – I cannot file anything at all.
RR3, Vol. 001, p. 13-14, Lines 15-25, 1-18

Parental Rights Subject to Father's Approval

14. Visitation Sites are NOT substitutions for parental-right to care, custody, and control[16] In addition to the unaffordable and unperformable conditions, there is the issue with the non-operational visitation center. Note, this issue is amplified by COVID, but there are thousands of Texas parents that have been affected by these types of visitation sites for several years. Hannah's House, even when it is operational, is not ran by trained licensed professionals, and without DFPS involvement, there is no authority that requires the primary managing conservators to comply. In this case, the SAPCR Order states that visitation is to occur at Hannah's House, but Hannah's House is not operational, so any deviations require Appellee's approval. Wise v. Bravo, (1981), finding that, "The non-custodial divorced parent has no way to implement the constitutionally protected right to maintain a parental relationship with his child except through visitation;" See In re Lemons, 47 S.W.3d 202, 206 (Tex. App. Beaumont 2001) (holding the trial court

[16] "[T]he relationship between parent and child is constitutionally protected," Quilloin v. Walcott, 434 U.S. 246, 255 (1978), and a parent's right to the care and custody of his child is a fundamental liberty interest more precious than property rights, In re M.S., 115 S.W.3d 534, 547-48 (Tex. 2003) (citing Santosky v. Kramer, 455 U.S. 745, 758- 59 (1982)). Complete denial of parental access amounts to a near-termination of a parent's rights to his child and should be reserved for situations rising nearly to the level that would call for a termination of parental rights. See Tex. Fam. Code Ann. § 161.001 (West Supp. 2010) (grounds for termination of parental rights). Thus, a "complete denial of access should be rare," In re Walters, 39 S.W.3d 280, 287 (Tex. App.-Texarkana 2001, no pet.), and reserved only for "the most extreme of circumstances," In re E.N.C., No. 03-07-00099-CV, 2009 Tex. App. LEXIS 1760, at *46 (Tex. App.-Austin Mar. 13, 2009, no pet.) (mem. op.). See Hale v. Hale, No. 04-05-00314-CV, 2006 Tex. App. LEXIS 747, at *8 (Tex. App.-San Antonio Jan. 25, 2006, pet. denied) (mem. op.) ("a complete denial of access should be rare" and possessory conservator should not be denied visitation "except in extreme circumstances"); Green v. Green, 850 S.W.2d 809, 812 (Tex. App.-El Paso 1993, no writ) (parent's entitlement to periodic visitation with child "cannot be denied except in extreme circumstances")

abused its discretion in entering a temporary order that effectively denied visitation to the father because it was unenforceable); See In re A.P.S., (Tex. App.—Texarkana 2001). Even if Mark could resist having Molly arrested for requesting visitation, Molly cannot afford the off-site visitation or many of the conditions in the final SAPCR.

Equalization Necessary -Structural Defect

15. While Mark had full access to community funds and was able to proceed with three attorneys who violated civil procedures, penal codes, ethical rules, constitutional rights... multiple times. The trial court denied Molly's request for temporary attorney's fees and spousal support on August 12, 2021, (CR1, p. 106). Equalization was especially necessary considering the 366th District Court of Collin County's policies that require litigants to have an attorney or risk losing substantive rights. See Policy on E-filing where if one party has counsel and the other party does not, the defenseless party is left to the mercy of OC.[17]

Denied Sanctions Request

16. The trial court missed an opportunity to restore equity when it denied sanctions against Mark and OC on November 17, 2021. See where "sanctions are

[17] [When a party files any Motion/Request through e-file, the court will not see or be made aware of the filing unless it is accompanied by a proposed order. The system does not send any notification that a document has been filed in a case. It is up to the attorney filing the Motion to follow-up with the court to obtain a hearing with every Motion/Request. A proposed order must be filed by the party requesting the hearing. The proposed order must be filed in advance of the hearing, preferably a day or two prior to the hearing.]

used to assure compliance with discovery and deter those who might be tempted to abuse discovery in the absence of a deterrent," *Downer,* 701 S.W.2d at 242. In this case, Mark and OC's behavior went undeterred, and their violations of civil procedure became increasingly egregious: (1) Mark violated Collin County's Local Rule 5.2 when he unilaterally canceled mediation;[18] (2) Mark violated Tex. Rules of Civ. P. when he did not serve pleadings on multiple occasions; (3) Mark violated rules of discovery, and (4) Mark and OC violated the law when they committed fraud and aggravated perjury at final trial and again when they presented the false claims in the Dallas County criminal court, and (5) Mark violated and continues to violate Molly, MCM, and MAM's, constitutional rights. Sanctions would have been necessary in this case; see Appellant's motion for sanctions, CR1, p. 424.[19]

17. The record indicates that Mark's ex parte pleadings were highly prejudicial. The trial court did not believe Molly was on drugs but signed Marks abusive drug testing requirements regardless. Ultimately, the trial court entered Mark's request to de facto terminate Molly's parental rights because, "Molly could not follow the rules." Molly's inability to follow specific instructions was imagined

[18] [It is the policy of the Collin County District Courts to encourage the peaceful resolution of disputes and the early settlement of pending litigation. If the Court finds that a party has delayed the mediation, or has not cooperated in scheduling the mediation, the Court may consider all appropriate actions, including sanctions.]

[19] With respect to whether the deficient performance prejudiced his defense, prejudice is shown when there exists a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. In re D.B., 153 S.W.3d 575, 577 (Tex. App.–Amarillo 2004, no pet.).

into reality and does not meet the statutory burden required to sever the parent-child bond. In re K.M.L., 443 S.W.3d 101, 121 (Tex. 2014) (Lehrmann, J., concurring).

> Court: [Now, if there is a genuine issue where you cannot do something and you cannot possibly get something completed, then the issue is that you then go to that — those attorneys over there and you —
> MS. WILKERSON: (Indiscernible) —
> THE COURT: Quit interrupting me. Then you go those attorneys and you show them that you cannot do it by being calm and rational in doing those things as oppose to doing the things that you are doing, which is, again, filing frivolous motions with this Court, or the e-mails that we've gotten back and forth between you where you're accusing people, calling them monsters, referring to those lawyers over there negatively.]
> RR3, Vol. 001, p.16, Lines 13-25
>
> [You keep telling me that Hannah's House won't accept new clients. Have you suggested of a different place?
> MS. WILKERSON: Yes. We've conferenced that. We've conferenced several times on the issues. I have the number of a man that comes and — wherever you are and it's –
> THE COURT: They have to agree to that. It can't just be, oh, we're going to go ahead — I picked somebody out of the phonebook and I'm going to go ahead and do that. That's not reasonable. That's not likely.
> MS. WILKERSON: It was from an attorney.
> THE COURT: So those are things you —
> MS. WILKERSON: Sir, it was from an —
> THE COURT: If you interrupt me one more time –]
> RR3, Vol., 001, p. 17, Lines 9-24

Precedent

The Supreme Court of Texas explained that "Tex. Fam. Code § 107.013(d) states:"

> [The court shall require a parent who claims indigence under Subsection (a) to file an affidavit of indigence in accordance with

> Rule 145(b) of the Texas Rules of Civil Procedure before the court may conduct a hearing to determine the parent's indigence under [section 107.013] . . . . If the court determines the parent is indigent, the court shall appoint an attorney ad litem to represent the parent.]
> *In the Interest of B.C.*, 2019 Tex. LEXIS 1268 (Tex. 2019)

Molly was not advised of right to appointed counsel when she filed affidavit of indigency in November of 2020, and she repeatedly requested an attorney, her request was ignored. If the trial court afforded Molly a hearing on her indigency when she filed her initial indigency documentation, Mark and his private CPS attorney would have been unable to take advantage of a pro se mom's ignorance of the law.

IN THE INTEREST OF MCM AND MAM, CHILDREN et al.

ARGUMENT – III

MARK'S PROTECTIVE ORDER

Issue #8. Mark's PO is barred by res judicata;

Issue #9. The trial court erred when it granted Mark a protective order against Molly and subjected her to criminal liability;

Issue #10. Mark's right to bear arms is waived under Standing Orders and Mark did not need or deserve a protective order against Molly;

As further evidence that a court other than the court of continuing jurisdiction may issue a protective order, Section 82.007 provides the application must include a copy of each court order affecting the conservatorship, support, and possession of or access to the child, or a statement that the orders affecting the child are unavailable

to the applicant and that a copy of the orders will be filed with the court before the hearing on the application. Id. § 82.007.

Res Judicata

1. Mark was not allowed to go back and add a "history and pattern of committing family violence" to the final SAPCR orders as though the suit was still pending. Mark and Molly had already gone through final trial, the case had been dismissed, and still yet final orders in SAPCR were set out on record. See where "acknowledging that all issues set forth in the decree regarding conservatorship are res judicata of that issue at the time of the decree, it is axiomatic that a post-decree PO, issued after conservatorship has been established by a court of continuing, exclusive jurisdiction, must be based on evidence adduced after the decree was entered." (Knowles, 437 S.W.2d). This result is logical, given the fact that even the court of continuing, exclusive jurisdiction is not permitted to relitigate matters of conservatorship.

2. On February 11, 2021, Mark made an initial claim to police to have Molly arrested that she choked him with her arm.[20] The next day, when the children were left out of the EPO, Mark filed a completely different claim[21] in his Collin

[20] Mark Maldonado said she was pulling on his neck with her weight, causing him severe pain to his neck. While Officer Garcia saw no marks on Mark Maldonado's neck, Mark Maldonado said he had difficulty breathing when she did this for about 15 seconds as he tried to walk away from her. (CR3, p. 40)

[21] Molly appeared to get more and more agitated. She then jumped on my back and held my neck with her hands, choking me. I was losing air and thought I would fall over. It seemed like she was trying to kill me. (CR2, p.15)

County APO, so he could include the children as protected parties -which ultimately, the trial court declined to do as well. (CR2, p.30) "The standard for the sufficiency and the efficacy of an affidavit is the facts must be set forth in a manner that if they are falsely sworn to, the affiant may be prosecuted and convicted of perjury." Williams v. Bagley, 875 S.W.2d at 808.[22]

3. At the hearing for Mark's PO on February 24, 2021, Molly was told that she would not be able to present evidence on March 3, 2021. In case: Striedel v. Striedel, 15 S.W.3d 163 (Tex. App.—Corpus Christi 2000, no pet.) – which states that a protective order proceeding under Title 4 of the Family Code, the court erred in denying the respondent the opportunity to present his evidence at the hearing.

4. When Mark filed for a PO on February 12, 2021; he omitted facts required by Tex. Fam. Code to obtain a PO either during the pendency of a divorce/SAPCR suit[23] or following the finality of a divorce/SAPCR suit,[24] yet he argued family code for both, which resulted in conflicting PO provisions. *See Mark's PO Application, CR2, p. 8.*

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[23] If an applicant chooses to pursue a protective order in the county where s/he resides, which is outside the jurisdiction of the suit, the applicant must inform the clerk of the court that a divorce or SAPCR is pending somewhere else (§85.062(b)).

[24] If the applicant is a former spouse of the respondent or the application involves a child who is subject to the continuing jurisdiction of a court, a copy of the divorce decree or Suit Affecting the Parent-Child Relationship (SAPCR) order must be attached to the application. If the order is unavailable at the time the application is filed, the pleading should state that it is unavailable and that the decree will be filed with the court before the hearing on the protective order (§82.006 and §82.007).

5. Final PO was entered on 3/3/2021. Afterwards, the trial court entered SAPCR provisions that superseded the PO. See Tex. Fam. Code § 85.009 where the PO is valid until superseded: "a protective order rendered is valid and enforceable pending further action by the court that rendered the order until the order is properly superseded by another court with jurisdiction over the order." In this case, the PO was granted and immediately superseded by a final SAPCR order. Mark requested a PO intended to prevent family violence during the pendency of a divorce/SAPCR suit, not intended to entrap a mother requesting court ordered visitation with the children. **The internally conflicting order of entrapment is VOID**.

6. The final PO was never served. It was technically provided in "open court," but this was in a Zoom hearing, and the physical order was not given to Molly. She was only aware of the provisions of the order that were rendered by the court during the hearing. See where "a protective order must be delivered to the respondent in accordance with Rule 21a of the Texas Rules of Civil Procedure, served in the same manner as a writ of injunction, or served in open court at the close of the hearing (§85.041(a))." Furthermore, the trial court crossed the children out as protected parties in Mark's proposed order. Molly had no reason to believe that she would be criminally liable for attempting to assert visitation rights as the trial court

did not orally admonish her on criminal liability.[25] Mark has already taken the opportunity to have Appellant put in jail for requesting to exercise her possession and access rights. This shouldbe construed as entrapment.[11] See Ex Parte Gordon, 584 S.W.2d 686, 688 (Tex. 1979); "where a protective order contains internally inconsistent provisions and wasremanded for corrective actions." *See Lewis, 2020 WL 7251448.* 11.

7. Mark's possession of a deadly weapon in a context he lured Molly into should be reason enough to believe that Molly felt threatened.[26] See *Bailey v.United States,* 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995), in which a key factor of finding an offense in the possession of a deadly weapon is "use." Here Mark brandished his weapon and took the child he had been withholding for over a month from Molly. In a contentious divorce and/or SAPCR proceeding, while under a standing order injunction that uses language restricting threatening behavior, to approach Molly with a deadly weapon, was in violation of (18 U.S.C. § 922(g)(8)); see United States v. Emerson, 270 F.3d 203 (5th Cir. 2001). Mark's on-record admittance to the possession of a 9mm Glock on the evening in question along with the multiple previous concerns of Mark's behavior with guns that had been presented

[25] If the respondent is not present at the hearing and the order has been reduced to writing, the clerk of the court shall immediately provide a certified copy of the order to the applicant and mail a copy of the order to the respondent via certified mail, return receipt requested pursuant to Rule 21a of the Texas Rules of Civil Procedure, by the third business day after the hearing (§85.041(d)).

[26] A gun is a deadly weapon, and its presence alone is a threat of imminent bodily injury. The definition of a deadly weapon does not require that the actor actually intend death or serious bodily injury; an object is a deadly weapon if the actor intends a use of the object in which it would be capable of causing death or serious bodily injury.

to the trial court should have rebutted Mark's inconsistent claim of being "strangled;" because **THIS IS TEXAS**, gun threats are tolerated. See Tex. Fam. Code § 71.004. [27]

[27] ["Family violence" means an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.]

IN THE INTEREST OF MCM AND MAM, CHILDREN et al.

ARGUMENT – IV

VEXATIOUS MOM

Issue # 11. The vexatious litigant statute is facially invalid;

Issue #12. The vexatious litigant statute is invalid as applied in this present case;

Issue #13. The trial court erred when designating Molly a vexatious litigant without allowing evidence submissions and arguments;

Issue #14. The vexatious litigant law violated Molly's substantive rights when it infringed upon her parental rights and rights to appeal.

~ The vexatious litigant statute is a lawful means of violating equity and visa versa, an equitable remedy for restricting use of law wherein no set of circumstances exist for which a law would require denying access to justice or tipping the scales to further disproportionately affect the already disproportionately affected. ~

Publicly Shamed for PO Request

1. The Trial Court Erred When Designating Molly a Vexatious Litigant. Molly does not meet the statutory requirements for the discriminatory designation, judicial bias is the more likely reason she did not prevail in litigation, (in addition to ineffective assistance of counsel), and it was an abuse of discretion when the trial court refused to hear Appellant's requests for protection and instead placed her name on a public list to shame her for requesting such.[28] "A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner or when it acts without reference to any guiding principles." Worford v. Stamper, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam); Pickens v. Pickens, 62 S.W.3d 212, 214 (Tex. App.-Dallas 2001, pet. Denied).

2. Molly has a right to request an order of protection from the trial court; "to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." United States v. Goodwin, 457 U.S. may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right."

[28] Appellate courts and commentators have characterized the conduct of some vexatious litigants as "legal bullying" and as "an assault upon the judicial system." The litigants' conduct is marked by "a general disregard for decency and logic." Litigation is used by them as "a cruel and effective weapon," and the choice of targets often includes "anyone who has suffered the slightest contact" with the plaintiff. Vexatious litigants are contemptuous of rules and immune to most sanctions and are responsible for millions of dollars in losses attendant to the operation of the judicial system. Millions of dollars more in losses are suffered by those who are targeted. (Texas Judicial Counsel, 2010) --- Defamation, Prejudicial

3. Molly has requested PO's for her own protection because Mark was abusive and posed threats to her, yet she has never requested that protective measures apply to the children. Mark however claimed she did in his motion to designate her a vexatious litigant. After a year of Mark's extreme efforts to keep the children from having any contact with her, Molly's perspective has rightfully changed. The present circumstance in which Mark is subjecting MCM and MAM to extreme, irreparable psychological harm without any empathy is reason enough to believe that Molly's pleadings for protection for her own safety were not only valid, but they should apply to the children as well. Restricting Molly's due process rights in this case was unreasonable. Regardless, Molly understands at this point, whether she does not have a right to access the Collin County Courts. The vexatious litigant designation was unnecessary to prove this point however because the trial court declined to grant hearings long before the designation. Is warning a pro se litigant about the vexatious litigant law considered legal advise?[29] It just makes sense that taking access to the courts away would at least require a high burden of proof as opposed to an ambiguous, vague one, and is there not an affirmative defense?[30]

[29] "American constitutional law, a statute is void for vagueness and unenforceable if it is too vague for the average citizen to understand, and a constitutionally-protected interest cannot tolerate permissible activity to be chilled within the range of the vagueness."

[30] Sec. 8.05. DURESS. (a) It is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another.

4. Molly is not a vexatious litigant; she is a parent denied that fundamental right; she is a mom desperate to hold, see, or even speak to her children; and she is a pro se litigant forced to navigate our complicated court system to overcome the unjust roadblocks intentionally stacked before her by Mark. Mark did not deserve his requested relief; his request to shame Molly on the public vexatious litigant list for confidentially requesting protection from his abuse was meant to deprive Molly of constitutional rights, and the vexatious litigant designation is in fact unconstitutional as applied to her case and any other case arising in family law contexts, and as a law frequently used to silence calls for justice, it is facially unconstitutional as well.

Legislative Intent

5. "Lawsuit" has a different meaning than "application." According to legislation regarding modification, "A petition to modify an existing order affecting the parent-child relationship is a new lawsuit. Tex. Fam. Code Ann. § 156.004; Hudson, 931 S.W.2d at 338 n.6 (noting that the 1995 recodification of the Family Code refers to a modification actions as "a suit for modification" rather than "a motion to modify" which emphasized that the legislature intended the trial courts to continue to treat motions to modify as original lawsuits)." This differentiation of "suits" as opposed to "motions" implies that there is a difference. Molly has filed one single lawsuit by and through an attorney. All other case actions were within the

context of that suit. An "application" for a PO is not a separate lawsuit and not grounds to find an indigent party vexatious. Furthermore, legislative authorities did not intend for a party to an underlying lawsuit to be declared a vexatious litigant in an "associated case," such as a protective order application; that is not how the legislature rolls in the state of Texas. In fact, the Texas Supreme court specifically promulgated the Guide-and-file Protective Order Application with the intent to expand the public's access to justice; not to prevent it. This is an impediment to accessing the justice system that is in fact a violation of equal protection rights

Multiplicity of Suits

6. The underlying case and associated cases arose from the same lawsuit, and regardless of whether or not Molly's attorney was forced to withdraw from the case, it was initiated by and through an attorney. Additionally, the Collin County Clerks instruct applicants to protective orders to file in a "different envelope," and they will force the PO application into the divorce cause. Even if this Court does not see Molly's case/s as one, unified cause, this Court should also consider the nature of PO's and SAPCR's. Both are intended to be relitigated after being finally determined. Appellant has filed one lawsuit by and through an attorney.

Unclean Hands

7. Furthermore, Mark was not entitled to equitable relief because he went to the court with unclean hands to request such. If PO applications are independent

lawsuits in a divorce suit, then so are writ requests and TRO's. Mark would have six additional vexatious suits as well as the initial SAPCR he filed and failed to serve. The harassing litigation that forced the withdraw of Molly's attorney should also Mark insisted on dragging Molly through a brutal divorce and custody battle. He had unclean hands and his vexatious litigant designation request, upon which he arrived with his hands covered in dirt, should have been denied. This was a violation of Molly's right to equal protection. Mark was GRANTED the right to maintain pride in his traumatizing behaviors, and Molly was ORDERED to live in fear that she will never be able to see her children again. See *Order Designating Molly Wilkerson Vexatious Litigant,* (CR, p. 48): "The court finds that there is not a reasonable probability that MOLLY L. WILKERSON will prevail in litigation against MARK MALDONADO." This assertion is vague, discriminatory, and prejudicial especially considering Molly's request for protection and the implications this claim makes regarding Molly's fundamental parental rights.

Misapplication of Law

8. The trial court misapplied the law when he found Molly to be a vexatious litigant. "MOLLY L. WILKERSON in the seven-year period immediately preceding the filing of the Motion, has commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in a small claims court that have been finally determined adversely to her." The misapplication of law first arises with

the fact that there were not five cases litigated, and then, with the words "immediately preceding" and "finally." According to publicly available case records. Molly's APO's were not finally determined until April 20, 2021. This proves Molly's point that her pleas for protection from Mark were ignored. Mark filed his motion on April 14, 2021, and every single APO cited in his motion was finally determined AFTER his motion was filed, not preceding it.

9. Mark has evaded service of the APO's, so the fact that applications were never served or noticed to even involve Mark as a party. [31] Mark lacked standing to impose this civil rights violation on Molly, he failed to meet the vague burden of proof, and his legislative loophole worming tactics should have provided the trial court with strong reasoning to disregard any of Mark's nonsense requests. This particular request came immediately following the acceptance of the underlying appeal, and there is a strong reason to believe that the request was made in an attempt to avoid any repercussions for committing fraud.

10. Additionally, Mark's request to designate Molly as a vexatious litigant only requests that the restrictions apply to Collin County, yet the order states that Molly's filing restrictions apply in all courts in the state of Texas. It is an abuse of discretion to grant more relief that is requested. Also, evidence is a required

[31] 4 See Yilmaz v. McGregor, 265 S.W.3d 631, 637 (Tex.App.-Houston [1st Dist.] 2008, pet. denied) ("To be a `party' to a lawsuit, one generally must be named in the pleadings and either be served, accept or waive service, or make an appearance. Merely being named in a petition as a defendant does not make one a `party' to the lawsuit.").

consideration for this specific finding, and the trial court expressed that he would consider the pleading as it were and declined to consider argument and evidence:

> "MS. JAMES: In regards to the motion for a declaration that Ms. Wilkerson is a vexatious litigant.
> THE COURT: The Court will take notice of the filing as it were. And with regard to the evidence on the specific filings that have been denied, I think the Court can take judicial notice of that."
> RR3, Vol. 001, p. 19, Lines 2-7

Unconstitutional as Applied

11. The unjust designation of the vexatious litigant statute is unconstitutional as applied in family law cases and even more specifically, cases involving parental rights. Texas Courts have found that it should not apply in cases arising from Tex. Crim. Code, and Florida (Florida Vexatious Litigant law, § 68.093), has found the designation is unconstitutional in cases arising under the family code. In this case, it served to restrict rightful access to the courts to defend her most precious right, the parent-child relationship. Molly was denied filing multiple reasonable requests for possession and access rights which have served to delay relief to a 6-year-old little boy and an 8-year-old little girl. Additionally, she was denied filing requests necessary for appeal including a Bill of Exception, "To challenge exclusion of evidence by the trial court on appeal, the complaining party must present the excluded evidence to the trial court by offer of proof or bill of exception." In re Estate of Miller, No. 05-06-01471-CV, 2008 WL 82530, *3 (Tex.

App.—Dallas 2008, no pet. H.). See Tex. R. App. P. 44.1[32] Additionally, in cause 05-21-00439-CV, Appellant was denied filing her writ of mandamus which is necessary because there is no adequate remedy on appeal.

Facially Unconstitutional

12. The vexatious litigant designation is facially unconstitutional. Under no circumstance should a law exist that serves to "protect" government entities and other such parties, Mark and his attorneys in this case, acting under color of law from citizen's redress regarding fraud which is exactly what has happened with Tex. Civ. Prac. & Rem. Code §§ 11.001–.104. Also, see United States v. Stevens, 559 U.S., in which the statute was facially unconstitutional because "No set of circumstances exists under which [the statute] would be valid" and "The statute lacks any 'plainly legitimate sweep." This is after all what immunities are for. The judicial branch of the United States government exists to serve the people as do the other branches. As for "protecting" the public from vexatious litigants, there are such things as anti-slapp laws, sanctions, and judicial discretion. The vexatious litigant designation serves to harm the people far more than it serves to protect them.

[32] Error requires reversal if it probably caused the rendition of an improper judgment or probably prevented appellant from properly presenting his case to the court of appeals. TEX.R.APP. P. 44.1(a); Dueitt, 180 S.W.3d at 741.

13. Specifically, the vexatious litigant law is a violation of the First Amendment Right to petition the Government for a redress of grievances,[33] and it violates Fourteenth Amendment, substantive due process rights. The Amendment 14 Clause says that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; no state shall deny to any person within its jurisdiction the equal protection of the laws, and the right of access to the courts." Fortunately, the United States Constitution is not as vaguely stated as Tex. Civ. Prac. & Rem. Code §§ 11.001–104. See Reno v. American Civil Liberties Union, 521 U.S.844 (1997), in which the court found "the challenged provisions were both vague and substantially overbroad;" also see substantial overbreadth determination in Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

14. There are no terms on the vexatious litigant statute. It survives death, no clear burden of proof, no option to request dismissal, and no punishment range, and there are no clear procedures for vacating the order. Also, since some counties do file PO's into divorce and custody cases, isn't that vague and overbroad? See C. Davis Case, https://www.txcourts.gov/media/747011/Chelsea-Davis.pdf in which she was a young patent attorney who allegedly reported a top firm executive for sexual assault; she was disbarred and placed on the vexatious litigant list. She killed

[33] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Smith v. Goguen, 415 U.S. 566 (1974). Generally, a vague statute that regulates in the area of First Amendment guarantees will be pronounced wholly void. Winters v. New York, 333 U.S. 507, 509–10 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940).

herself in February of last year, and her legacy will be that she was a liar who filed harassing litigation. The most tragic cases on that list are those with children though. When pro se litigants who have their children ripped from their lives litigate and try to learn the law, it is hope and faith that there is still justice. There is no need to take that from a grieving parent. The vexatious litigant statue is overbroad, harassing, unduly burdensome, meant to harass, delay, and annoy, and meritless -usually brought in bad faith. And, there is no way to defend from it.

Noblesse Oblige

15. Many vexatious litigants are lawyers and even judges. These individuals as well as countless other vexatious litigants that are not professionals in law are advocates for social justice. By and large, the public does not know the reality of the injustice that can occur in our court system, but a significant amount of vexatious litigants do. Many vexatious litigants have been subjected to power differentials that have destroyed their lives in one way or another, yet they have found the strength to stand up for themselves and for what is right. Appellant is fighting for her children. This is not vexatious; this is the only choice she has. This fight stands as defense for more than just her rights, because if it can happen to her, it can happen to anyone.[34] The vexatious litigant law is a tool to silence advocacy

[34] See where public interest is involved Appellant has firm standing to raise the issue (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 315, p. 326.) "The issue of judicial gender bias obviously involves both a public interest and the due administration of justice." (Catchpole v. Brannon, supra, 36 Cal.App.4th at p. 244.)

and to keep quiet those effected by inequity, injustice, and the reality of a broken system. It endangers the public and threatens the foundation of justice that is the United States Constitution. Vexatious litigants are forced to vexatiously litigate when they have to become their own heroes because the reality is, there just aren't enough. Noblesse Oblige is lost to unethical attorneys unchecked by oversite and narcissistic abusers, so as for those willing and able to stand up for their fundamental rights, they should not be branded into further inequity. A line must be drawn for the vexatious litigant designation at the very least, for children and families. This is not contempt; this is not the best interest of the child; this is prison, it is Hell; it is emotional pain so deep, it physically hurts; as for the babies that do not understand, they have lost a piece of their childhood. What is the going rate for the innocence of children?

IN THE INTEREST OF MCM AND MAM, CHILDREN et al.

CONCLUSION

The trial court did not just abuse its discretion, he abused a mother and litigant in his Court while wearing a robe that is symbolic of justice. Molly was yelled at repeatedly, belittled, and stripped of her parental rights and due process rights. Every time opposing counsel filed ex parte pleadings, the trial court hung on to the words accusing Molly of not being able to listen or "follow simple instructions," to the point that the trial court repeats on multiple occasions such things as: "that is why you can't see your children," or "you've ruined the relationship with your children."

> [You have done everything possible to violate these Court's orders and do the things that are not necessary so that you, no one else but you, ruin that relationship with your children.]
> RR Sup. 1, Vol. 005, P. 164, Lines 1-4.

The vexatious litigant designation itself shows bias. It is a beyond-life sentence that imposes prejudice in-of-itself and warns off gainful employers at a greater rate than a felony criminal charge. The trial court held to the prejudicial ex parte slander submitted on February 22, 2021 when he claimed that Molly had committed "aggravated assault," and he placed her name on a public list of roughly

only 350 other Texans to restrict her access to the courts because why again? Because the errors in this case were all Molly's fault? Because she could not listen?

Meanwhile, Mark and Claire were using the rulings in the civil trial court to motivate prosecution in criminal court. The PO was used to push for indictment in a case that should have never even existed. The criminal court indictment was then used as the only "judicially noticed" evidence to justify the decision to declare Molly vexatious. Additionally, in May of 2021, Mark had her charged with a Class A Misdemeanor, VPO, for texting, "meet me at Hannah's House" for visitation. Mark used the vexatious litigant designation to claim, "Molly has harassed me on so many different occasions that the courts had to declare her a vexatious litigant." Both criminal cases reference the civil trial court's falsely "deemed" fact that Molly was found to be an illicit methamphetamine user and both cite Molly's vexatious litigant designation as an extraneous act. These judges and prosecutors see Molly as both a novelty and a judicial nightmare before even assessing the reality of the case. Additionally, when you're a mom and your children are ripped from you life, society believes you deserve it, that surely if a mom can lose all custody, she did something to deserve it. Molly wants her kids back, and she wants her life back. She does not deserve it, and her babies do not deserve it, and due process requires it. See State v. Brown, 776 P.2d 1182, 1188 (Haw. 1989) (concluding that due process requires that justice "satisfy the appearance of justice").

This is a case of abuse. the physical abuse and emotional abuse was irrelevant to the trial court. The economic abuse that prevented Molly from leaving Mark entered this Court jurisdiction when Mark denied Molly equal access to justice and subsequently, terrorized her through trial court proceedings. Mark cut Molly off from her 14-years of contributions to their estate when he denied their legitimate informal marriage, he harassed her attorney into withdraw through overly burdensome litigation demands, and then, he weaponized the children against Molly in depriving her access to them -**hurting them more than anyone else.**

The abuse does not stop with him. Mark's team of attorneys hold a share of responsibility in this gross case of injustice through their own abuse of the judicial process. They attempted to keep Molly ignorant to their improper, unethical actions that led to the denial of her parental rights by **sealing records**. They had to seek further measures by robbing her of her due process rights and first amendment rights because she would not stop fighting for her parental rights. When appeals proceeded despite their efforts, they perpetuated Mark's manufactured criminal case against her. They harassed a criminal prosecutor with slanderous claims inserted in the civil case in an effort to violate Molly's physical liberties because at this point, when faced with never seeing her children again, prison is likely the only way to silence her calls to justice. Mark Maldonado, Claire James, and George Mallers have broken laws, acted unethically, and violated the rights of a mother and the children in the

matter, and their actions have led the trial court to his own misconduct in not only allowing this to go on, but in signing off on it. He allowed them to take advantage of his Court and make a mockery of the justice system, and the harm that has resulted is not quantifiable. Alea iacta est.

> [Again, Your Honor, we're not here to say that Molly Wilkerson is a bad person**. We're not here to say -- to ruin her life** and cause her harm.]
> RR Sup. 1, Vol. 004, P. 144, Line 8-10.
>
> [We think, Judge, this is a person who needs help. And we think that what's best for the kids is for mom to get healthy so that she can be a good mom and be around her kids.]

"Make no mistake. It's not revenge she's after. It's a reckoning,"

IN THE INTEREST OF MCM AND MAM, CHILDREN et al.

SUMMARY OF REQUESTED RELIEF

1. Construe brief as mandamus petition as deemed necessary;
2. Reverse, render order granting informal marriage and remand to trial court for final decree determinations;
3. Reverse, render temporary SAPCR orders for close continuing relationship between mother and children, or in the alternative, remand for immediate trial court relief;
4. Reverse and render vacatur of Mark's void protective order;
5. Sanction Mark and OC;
6. Reverse and render vacatur of Molly's vexatious litigant designation;

PRAYER

Molly prays the Honorable Justices of the 5th Court of Appeals reverse and render judgment vacating the unjust vexatious litigant designation and Mark's final PO; she further moves this Honorable court to reverse the SAPCR order, render temporary orders for immediate relief, and remand for further resolution. Lastly,

Molly prays this Court reverse the order denying the marriage, deem the informal marriage legitimate, and remand for divorce proceedings. If possible, please sanction the sadistic actors. They deserve to lose their Bar Cards and do prison time, but sanctions would be a perfect starting point. Appellant further prays this Honorable Court grant any other relief it deems necessary in law and in equity. As always, thank you for your time, effort, and consideration in this matter.

Respectfully Submitted,

/s/ Molly Wilkerson

Molly Wilkerson, Appellant
missmolly2020@aol.com
218 Castleridge Dr.
Little Elm, TX 75068
214-636-4719

CERTIFICATIONS

CERTIFICATE OF OATH

My name is Molly Wilkerson. I am over the age of 18, and I am fully competent to execute this Certification. I am the Appellant in this case. I am the person filing the Brief. The Record already before the Court contains a true and correct copy of every document that is material to Appellant's claim for relief filed in these proceedings.

/s/ Molly Wilkerson

CERTIFICATE OF COMPLIANCE

The word processing used to write this brief reports its length at 23,970 words including the contents that may be excluded under Rule 9.4(i)(1).

/s/ Molly Wilkerson

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing Brief has been sent to Counsel for Appellee , Mark Maldonadothrough electronic service on April 22, 2022.

/s/ Molly Wilkerson

Attorneys for Mark Maldonado

G. Tony Mallers
Texas Bar No. 12861500
tmallers@cowlesthompson.com

Claire E James
Texas Bar No. 24083240
cjames@cowlesthompson.com

Gracen M. Daniel
Texas Bar No. 24116248
gdaniel@cowlesthompson.com

Julia F. Pendery
Texas Bar No. 15744050
jpendery@cowlesthompson.com

/s/ Molly Wilkerson

Molly L. Wilkerson /Pro se

Phone: 214-636-4719
Email: missmolly2020@aol.com
Adress: 218 Castleridge dr.
Little Elm, TX 75068

EXHIBIT B - CASE EQUIVALENT

IN THE SUPREME COURT OF TEXAS

NO. 13-0043

ROBERT KINNEY, PETITIONER,

v.

ANDREW HARRISON BARNES (A/K/A A. HARRISON BARNES, A. H. BARNES, ANDREW H. BARNES, HARRISON BARNES), BCG ATTORNEY SEARCH, INC., EMPLOYMENT CROSSING, INC. AND JD JOURNAL, INC., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued January 9, 2014

JUSTICE LEHRMANN delivered the opinion of the Court.

A hallmark of the right to free speech under both the U.S. and Texas Constitutions is the maxim that prior restraints are a heavily disfavored infringement of that right. So great is our reticence to condone prior restraints that we refuse to allow even unprotected speech to be banned if restraining such speech would also chill a substantial amount of protected speech. This danger is before the Court today, as we are asked whether a permanent injunction restraining future speech is a constitutionally permissible remedy for defamation following an adjudication on the merits. On the one hand, it is well settled that defamation is an abuse of the privilege to speak freely; our

holding today does not disturb that. On the other, it is also well settled that prior restraints are rarely permitted in Texas due to their capacity to chill protected speech.

The issue at hand is more specifically presented as whether a permanent injunction is an unconstitutional prior restraint where the injunction (1) requires the removal or deletion of speech that has been adjudicated defamatory, and (2) prohibits future speech that is the same or similar to the speech that has been adjudicated defamatory. We hold that, while the former does not enjoin future speech and thus is not a prior restraint, the latter constitutes a prior restraint that impermissibly risks chilling constitutionally protected speech. Because the court of appeals failed to recognize this distinction in affirming summary judgment for the defendant, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

I. Background

BCG Attorney Search, Inc. employed Robert Kinney as a legal recruiter until 2004, when he left and started a competing firm. Several years later, BCG's President, Andrew Barnes, posted a statement on the websites JDJournal.com and Employmentcrossing.com implicating Kinney in a kickback scheme during his time with BCG. Describing allegations in a lawsuit Barnes had previously filed against Kinney in California, Barnes stated:

> The complaint also alleges that when Kinney was an employee of BCG Attorney Search in 2004, he devised an unethical kickback scheme, attempting to pay an associate under the table at Preston, Gates and Ellis (now K&L Gates) to hire one of his candidates. Barnes says that when he discovered this scheme, he and other BCG Attorney Search recruiters immediately fired Kinney. The complaint in the action even contains an email from Kinney where he talks about paying the bribe to an associate at Preston Gates in return for hiring a candidate.

The posted statements prompted Kinney to sue Barnes, BCG, and two other companies Barnes owned (Employment Crossing, Inc. and JD Journal, Inc.) for defamation in Travis County. Kinney did not seek damages in his petition, requesting only a permanent injunction following a trial on the merits.[1] Specifically, Kinney sought an order requiring Barnes to (a) remove the allegedly defamatory statements from Barnes's websites, (b) contact third-party republishers of the statements to have them remove the statements from their publications, and (c) conspicuously post a copy of the permanent injunction, a retraction of the statements, and a letter of apology on the home pages of Barnes's websites for six months. Kinney has since abandoned his demand for an apology and retraction.

Barnes filed a motion for summary judgment on the ground that the relief sought would constitute an impermissible prior restraint on speech under the Texas Constitution. The trial court granted the motion, and the court of appeals affirmed without addressing whether Barnes's statements were defamatory. We too will limit our review to the constitutionality of Kinney's requested relief and assume only for purposes of that analysis that the complained-of statements are defamatory.

II. Discussion

"Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of

[1] According to Barnes, Kinney previously filed and nonsuited a defamation suit against the same defendants seeking monetary damages but no injunctive relief.

speech or of the press." TEX. CONST. art. I, § 8. Enshrined in Texas law since 1836,[2] this fundamental right recognizes the "transcendent importance of such freedom to the search for truth, the maintenance of democratic institutions, and the happiness of individual men." TEX. CONST. art. I, § 8 interp. commentary (West 2007). Commensurate with the respect Texas affords this right is its skepticism toward restraining speech. While abuse of the right to speak subjects a speaker to proper penalties, we have long held that "pre-speech sanctions" are presumptively unconstitutional. *Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992); *see also Ex parte Tucker*, 220 S.W. 75, 76 (Tex. 1920).

The First Amendment of the U.S. Constitution is similarly suspicious of prior restraints, which include judicial orders "forbidding certain communications" that are "issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation and internal quotation marks omitted). The U.S. Supreme Court has long recognized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *see also id.* ("If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." (quoting A. BICKEL, THE MORALITY OF CONSENT 61 (1975))). As such, they "bear[] a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). This cornerstone of First

[2] The provision as currently worded dates back to 1876, but a similar provision was part of the 1836 Texas Independence Constitution. *Davenport v. Garcia*, 834 S.W.2d 4, 7–8 (Tex. 1992).

Amendment protections has been reaffirmed time and again by the Supreme Court,[3] this Court,[4] Texas courts of appeals,[5] legal treatises,[6] and even popular culture.[7]

Nevertheless, freedom of speech is "not an absolute right, and the state may punish its abuse." *Near v. Minnesota*, 283 U.S. 697, 708 (1931) (citation and internal quotation marks omitted). To that end, the common law has long recognized a cause of action for damages to a person's reputation inflicted by the publication of false and defamatory statements. *Neely v. Wilson*, 418 S.W.3d 52, 60 (Tex. 2013) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 (1990)); *see also Ex parte Tucker*, 220 S.W. at 76 ("There can be no justification for the utterance of a slander. It cannot be too strongly condemned."). The U.S. Supreme Court and this Court have been firm in the conviction that a defamer cannot use her free-speech rights as an absolute shield from punishment.

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[3] *See, e.g.*, *Stuart*, 427 U.S. at 561 ("[I]t is . . . clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it."); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

[4] *Davenport*, 834 S.W.2d at 9; *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983) (per curiam); *Ex parte Price*, 741 S.W.2d 366, 369 (Tex. 1987) (Gonzalez, J., concurring) ("Prior restraints . . . are subject to judicial scrutiny with a heavy presumption against their constitutional validity.").

[5] *Tex. Mut. Ins. Co. v. Sur. Bank, N.A.*, 156 S.W.3d 125, 128 (Tex. App.—Fort Worth 2005, no pet.) ("[P]rior restraints on speech are presumptively unconstitutional."); *San Antonio Express–News v. Roman*, 861 S.W.2d 265, 267 (Tex. App.—San Antonio 1993, orig. proceeding) (per curiam).

[6] *See* Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 173 (2007) ("[N]ever in the 216 year history of the First Amendment has the Supreme Court found it necessary to uphold a prior restraint in a defamation case . . . ."); A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 656 (2008).

[7] THE BIG LEBOWSKI (PolyGram Filmed Entertainment & Working Title Films 1998) ("For your information, the Supreme Court has roundly rejected prior restraint.").

This case asks us to examine these conflicting principles, and involves a two-part inquiry. First, we examine whether a permanent injunction against defamatory speech, following a trial on the merits, is a prior restraint. Kinney contends that such a "post-trial remedial injunction" is not properly characterized as a prior restraint at all, much less one that is constitutionally impermissible. Barnes maintains that a permanent injunction against future speech, whether issued before or after the conclusion of a defamation trial, is necessarily a prior restraint. If the permanent injunction is a prior restraint, we must then determine whether it overcomes the heavy presumption against its constitutionality. Kinney argues that defamatory speech is not protected and that enjoining its continuation is therefore permissible. Barnes responds that the presumption cannot be overcome because such injunctions pose too great a risk to free speech.

We first acknowledge the parties' arguments regarding whether Article I, Section 8 of the Texas Constitution affords greater free-speech protection than the First Amendment of the U.S. Constitution. *Compare* TEX. CONST. art. I, § 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."), *with* U.S. CONST. Amend. 1 ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."). Barnes argues that we have consistently interpreted Texas's constitutional recognition of free-speech rights more broadly than its federal counterpart. *See Davenport*, 834 S.W.2d at 8–9 ("[O]ur free speech provision is broader than the First Amendment."). In *Operation Rescue–National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, however, we clarified that "Article 1, Section 8 *may* be more protective of speech in some instances than the First Amendment, but if it is, it must

be because of the text, history, and purpose of the provision, not just simply *because*." 975 S.W.2d 546, 559 (Tex. 1998) (first emphasis added) (internal citation omitted). We further concluded: "We know of nothing to suggest that injunctions restricting speech should be judged by a different standard under the state constitution than the First Amendment." *Id.*

We need not determine whether the Texas Constitution provides greater protection than the First Amendment on the specific issue presented to us, as the U.S. Supreme Court has not definitively addressed it. Rather, we reiterate the unremarkable proposition that in interpreting our own constitution, we "should borrow from well-reasoned and persuasive federal procedural and substantive precedent when this is deemed helpful, but should never feel compelled to parrot the federal judiciary." *Davenport*, 834 S.W.2d at 20. We look to federal cases for guidance, not as binding authority. *Id.*

A. Classification of a Post-Adjudication Permanent Injunction Against Defamatory Speech as a Prior Restraint

The first issue we must dispose of is whether a permanent injunction prohibiting future speech related to statements that have been adjudicated defamatory is a prior restraint. If it is not, then our constitutional concerns regarding the use of prior restraints are inapplicable. This question highlights the distinction Kinney emphasizes between permanent injunctions on speech adjudicated defamatory and pretrial temporary injunctions on allegedly defamatory speech. Kinney argues that this distinction is meaningful. We disagree—as to the question presented, it is a distinction without a difference.

We have squarely held that a temporary injunction prohibiting allegedly defamatory speech is an unconstitutional prior restraint, but we have not specifically addressed the propriety of a post-adjudication permanent injunction in a defamation case. *See Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983) (per curiam). In *Hajek*, the plaintiff sought and obtained a temporary injunction restraining the defendant from driving his car around the community with a message painted on all four sides that Bill Mowbray Motors sold him a "lemon." *Id.* at 254. We reversed, holding that the injunction was a prior restraint in violation of the Texas Constitution. *Id.* at 255. Accordingly, we overturned the lower courts' decisions granting the injunction.

Our decision in *Hajek* rested on the well-settled legal principles laid out in *Ex parte Tucker*. In that case, the trial court enjoined the members of a worker's union from "vilifying, abusing, or using . . . epithets" against their employer. 220 S.W. 75, 75 (Tex. 1920). In overturning the injunction, we relied on the dichotomy between the Texas Constitution's affirmative grant of the liberty to speak without fear of curtailment and the commensurate responsibility inherent in that right. *Id.* at 76. We stated that "the abuse of the privilege . . . is not to be remedied by denial of the right to speak, but only by appropriate penalties for what is wrongfully spoken." *Id.* Accordingly, we held that the injunction was beyond the power of the trial court to issue. *Id.*

Kinney contends that *Hajek* and *Tucker* classify as prior restraints only temporary injunctions against speech that is alleged, but not proven, to be defamatory, and that these cases therefore do not apply to a post-adjudication permanent injunction. But our holding that the injunctions were prior restraints did not rest on their pretrial issuance. Rather, we took issue with the trial courts' decision

to remedy the defendants' abuse of their liberty to speak by preventing their future exercise of that liberty. *Id.*; *Hajek*, 647 S.W.2d at 255.

In this case, Kinney's request for injunctive relief may be broken down into two categories. First, as reflected in the pleadings, Kinney would have the trial court order Barnes to remove the statements at issue from his websites (and request that third-party republishers of the statements do the same) upon a final adjudication that the statements are defamatory. Such an injunction does not prohibit future speech, but instead effectively requires the erasure of past speech that has already been found to be unprotected in the context in which it was made. As such, it is accurately characterized as a remedy for one's abuse of the liberty to speak and is not a prior restraint. *See Hajek*, 647 S.W.2d at 255.[8]

As Kinney confirmed at oral argument, however, his request is not so limited. Kinney would also have the trial court permanently enjoin Barnes from making similar statements (in any form) in the future. That is the essence of prior restraint and conflates the issue of whether an injunction is a prior restraint with whether it is constitutional. As Professor Chemerinsky has aptly explained:

> Courts that have held that injunctions are not prior restraints if they follow a trial, or if they are directed to unprotected speech, are confusing the question of whether the injunction is a prior restraint with the issue of whether the injunction should be allowed. Injunctions are inherently prior restraints because they prevent future speech.

[8] Of course, the requirements for injunctive relief still must be met. A plaintiff must show that damages are inadequate or cannot otherwise be measured by any pecuniary standard. *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 111 (Tex. 2001) (per curiam). And aside from constitutional free-speech considerations, we also express no opinion on the propriety of an injunction that would order Barnes to seek removal of the statements from websites over which he has no control. We hold only that the constitutional concerns applicable to prior restraints are not present when the injunction is limited to requiring removal of a published statement that has been adjudicated defamatory.

Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 165 (2007); *see also Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1089 (C.D. Cal. 2012) ("Injunctions against any speech, even libel, constitute prior restraints: they prevent[] speech before it occurs, by requiring court permission before that speech can be repeated." (citation and internal quotation marks omitted)). Even in the few cases in which the Supreme Court has upheld a content-based injunction against speech, it has not been because the injunction was not a prior restraint, but because under the circumstances the restraint was deemed constitutionally permissible. *See Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441–42 (1957) (beginning its analysis with the notion that "'the protection even as to previous restraint is not absolutely unlimited,'" while recognizing that "the limitation [on such protection] is the exception" (quoting *Near*, 283 U.S. at 716)). Accordingly, we hold that an injunction against future speech based on an adjudication that the same or similar statements have been adjudicated defamatory is a prior restraint.[9]

However, "[l]abeling respondents' action a prior restraint does not end the inquiry." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). Notably, the U.S. Supreme Court has never approved a prior restraint in a defamation case. Chemerinsky, 57 SYRACUSE L. REV. at 167; *see, e.g.*, *Near*, 283 U.S. at 706 (invalidating statute allowing courts to enjoin publication of future issues of newspaper because previous editions were found to be "'chiefly devoted to malicious, scandalous

[9] The lack of a dispositive distinction between temporary and permanent injunctions as to the second category of injunctive relief requested is highlighted by the requirements that must be satisfied to obtain a temporary injunction. An applicant must "plead and prove," among other things, "a probable right to the relief sought." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Absent a showing of a likelihood of success on the merits, a temporary injunction may not issue. *In re Newton*, 146 S.W.3d 648, 652 (Tex. 2004). While the standard to prevail at trial is certainly higher, the effect of the permanent injunction is the same: speech is restrained before it occurs.

and defamatory articles'"). However, the Court has not decided whether the First Amendment prohibits the type of injunction at issue in this case, leaving that question unsettled.[10] Turning to the issue of whether the injunction against future speech sought by Kinney, though a prior restraint, is nevertheless permissible under the Texas Constitution, we hold that it is not.

B. Prior Restraints on Future Speech Related to Statements That Have Been Adjudicated Defamatory Violate the Texas Constitution

Again, prior restraints bear a heavy presumption against their constitutionality. *Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The proponent of such restraints thus "carries a heavy burden of showing justification for the imposition of such a restraint." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). While prior restraints are plainly disfavored, however, the phrase itself is not a "self-wielding sword," but a demand for individual analyses of how prior restraints will operate. *Kingsley Books*, 354 U.S. at 441–42. In examining the propriety of injunctive relief, then, we bear in mind the category of speech sought to be enjoined and the effect of such relief on a person's liberty to speak freely.[11]

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[10] The issue was presented to the Supreme Court in *Tory v. Cochran*. 544 U.S. 734 (2005). In that case, noted attorney Johnnie Cochran sued Ulysses Tory, a former client, after Tory began engaging in activities such as picketing Cochran's office and sending the attorney threatening letters due to Tory's dissatisfaction with Cochran's services. *Id.* at 735. Tory indicated that he would continue his activities barring a court order, and the trial court issued a permanent injunction against Tory's defamatory speech. *Id.* Tory appealed, presenting to the Supreme Court the very issue before us today. *Id.* at 737–38. However, Cochran died shortly after oral argument, and the Court sidestepped the question, holding that Cochran's death resulted in the injunction's "los[ing] its underlying rationale" of protecting Cochran from defamation. *Id.* at 738.

[11] The parties dispute whether Kinney waived his argument that defamatory speech is not "protected" speech under the Texas and U.S. Constitutions. We resolve this dispute by stating only that we cannot divorce the type and quality of speech at issue—in this case, defamatory speech—from the constitutionality of restraining it.

1. Texas Law Comports with the Traditional Rule That Injunctive Relief Is Not Available in Defamation Actions

"The traditional rule of Anglo-American law is that equity has no jurisdiction to enjoin defamation." Chemerinsky, 57 SYRACUSE L. REV. at 167 (explaining that the rule dates back to eighteenth-century England and was adopted "with remarkable uniformity" by nineteenth- and twentieth-century American courts); *see also, e.g.*, *Kramer v. Thompson*, 947 F.2d 666, 677 (3d Cir. 1991) ("[T]he maxim that equity will not enjoin a libel has enjoyed nearly two centuries of widespread acceptance at common law."). Our treatment of the temporary injunctions in *Ex parte Tucker* and *Hajek*, and more recent decisions on prior restraints, leave no doubt that the current state of Texas law is in accordance with this traditional rule with regard to future speech.

We have indicated that a prior restraint may be permissible "only when essential to the avoidance of an impending danger," *Davenport*, 834 S.W.2d at 9, and only when it is the least restrictive means of preventing that harm, *Ex parte Tucci*, 859 S.W.2d 1, 6 (Tex. 1993); *see also Hajek*, 647 S.W.2d at 255; *Ex parte Tucker*, 220 S.W. at 76.[12] We explained in *Tucker* the significant distinction between curtailing a person's liberty of speech, which the Texas Constitution forbids, and penalizing a person's abuse of that liberty, which the Constitution allows:

> The purpose of [Article I, Section 8] is to preserve what we call 'liberty of speech' and 'the freedom of the press,' and at the same time hold all persons accountable to the law for the misuse of that liberty or freedom. Responsibility for the abuse of the privilege is as fully emphasized by its language as that the privilege itself shall be free from all species of restraint. But the abuse of the privilege, the

[12] Applying that concept in the context of reviewing a gag order, we held in *Davenport* that such an order "will withstand constitutional scrutiny only where there are specific findings supported by evidence that (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm." 834 S.W.2d at 10.

> provision commands, shall be dealt with in no other way. It is not to be remedied by denial of the right to speak, but only by appropriate penalties for what is wrongfully spoken. Punishment for the abuse of the right, not prevention of its exercise, is what the provision contemplates. There can be no liberty in the individual to speak, without the unhindered right to speak. It cannot co-exist with a power to compel his silence or fashion the form of his speech. Responsibility for the abuse of the right, in its nature pre-supposes freedom in the exercise of the right. It is a denial of the authority, anywhere, to prevent its exercise.

220 S.W. at 76. Citing *Tucker*, we plainly stated in *Hajek* that "[d]efamation alone is not a sufficient justification for restraining an individual's right to speak freely." 647 S.W.2d at 255. Our courts of appeals have continued to recognize that the appropriate remedy for defamation is damages, not injunctive relief. *See, e.g.*, *Cullum v. White*, 399 S.W.3d 173, 189 (Tex. App.—San Antonio 2011, no pet.); *Brammer v. KB Home Lone Star, LP*, 114 S.W.3d 101, 108 (Tex. App.—Austin 2003, no pet.) ("Although the specific damages sustained from defamation and business disparagement-related activity is often difficult to measure, it is nonetheless well established that this type of harm does not rise to the level necessary for the prior restraint to withstand constitutional scrutiny.").

2. Injunctions Cannot Effectively Remedy the Harm Caused by Defamation Without Chilling Protected Speech

Contending that *Hajek* "ignored decades of intervening precedent from the U.S. Supreme Court," Kinney relies on Supreme Court case law upholding injunctions in the context of obscenity and commercial speech to argue that post-trial injunctions against defamatory speech are consistent with the First Amendment. In *Kingsley Books*, for example, the Supreme Court considered a New York statute that allowed municipalities to bar the continued sale of written and printed materials adjudicated obscene. 354 U.S. at 437. The Supreme Court upheld the statute, holding that it "studiously withholds restraint upon matters not already published and not yet found offensive." *Id.*

at 445. By contrast, the Court held, the statute struck down in *Near v. Minnesota* had empowered the courts "to enjoin the dissemination of future issues of a publication because its past issues had been found offensive." *Id.*

And in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the Supreme Court upheld an administrative order prohibiting a newspaper from continuing to run gender-specific help-wanted ads pursuant to the enforcement of a local anti-discrimination law. 413 U.S. 376, 379 (1973). The Court concluded that the speech at issue constituted illegal commercial speech, holding that the injunction "d[id] not endanger arguably protected speech" and was therefore permissible. *Id.* at 390.

Even after these decisions, several courts addressing the issue presented here have continued to adhere to the traditional rule that defamation alone will not justify an injunction against future speech. *See Metro. Opera Ass'n v. Local 100*, 239 F.3d 172, 177 (2d Cir. 2001); *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1090 (C.D. Cal. 2012); *Tilton v. Capital Cities/ABC Inc.*, 827 F. Supp. 674, 681 (N.D. Okla. 1993) ("The fundamental law of libel in both Oklahoma and Texas is that monetary damages are an adequate and appropriate remedy and that injunctive relief is not available."); *New Era Publ'ns Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1525 (S.D.N.Y. 1988) ("[W]e accept as black letter that an injunction is not available to suppress defamatory speech."); *Demby v. English*, 667 So. 2d 350, 355 (Fla. Ct. App. 1995) (per curiam) (noting that the claim for injunctive relief was "frivolous" in light of the "well-established rule that equity will not enjoin either an actual or a threatened defamation" (citation and internal quotation marks omitted)); *Willing v. Mazzocone*, 393 A.2d 1155, 1157–58 (Pa. 1978) (holding that a permanent injunction against

defamatory speech violated a provision of the Pennsylvania Constitution that is substantially similar to Article I, Section 8 of the Texas Constitution). By contrast, a small number of states have cited the Supreme Court cases referenced above in holding that narrowly drawn, post-trial injunctions against defamatory speech are constitutional. *See Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302 (Ky. 2010); *St. James Healthcare v. Cole*, 178 P.3d 696 (Mont. 2008); *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007); *Retail Credit Co. v. Russell*, 218 S.E.2d 54 (Ga. 1975); *O'Brien v. Univ. Cmty. Tenants Union, Inc.*, 327 N.E.2d 753 (Ohio 1975); *see also Lothschuetz v. Carpenter*, 898 F.2d 1200 (6th Cir. 1990).

In *Balboa*, for example, the trial court found that Lemen had made defamatory statements about the Balboa Village Inn and issued a permanent injunction prohibiting her from engaging in numerous acts, including repeating those statements. 156 P.3d at 342. The California Supreme Court described *Kingsley Books* and *Pittsburgh Press* as holding that "an injunctive order prohibiting the repetition of expression that had been judicially determined to be unlawful did not constitute a prohibited prior restraint of speech." *Id.* at 346–47. The court concluded that, while the particular injunction at issue in *Balboa* was overbroad, a court may issue an injunction prohibiting a person from repeating statements that have been adjudicated defamatory following a trial on the merits. *Id.* at 349–50.

We do not read *Kingsley Books* and *Pittsburgh Press* so broadly and decline to extend their holdings to the defamation context. To that end, we agree with the district court in *Oakley* that injunctions against defamation are impermissible because they are necessarily "ineffective,

overbroad, or both." 879 F. Supp. 2d at 1090. That is, "[a]ny effective injunction will be overbroad, and any limited injunction will be ineffective." Chemerinsky, 57 SYRACUSE L. REV. at 171.

On the one hand, for any injunction to have meaning it must be effective in its purpose. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976) (assessing "the probable efficacy of prior restraint on publication as a workable method" of accomplishing its purpose); *N.Y. Times Co. v. United States*, 403 U.S. 713, 744 (1971) (Marshall, J., concurring) ("It is a traditional axiom of equity that a court of equity will not do a useless thing . . . ."). The narrowest of injunctions in a defamation case would enjoin the defamer from repeating the exact statement adjudicated defamatory. Such an order would only invite the defamer to engage in wordplay, tampering with the statement just enough to deliver the offensive message while nonetheless adhering to the letter of the injunction. Kinney admitted as much at oral argument, agreeing that the injunction he is seeking would extend to speech that was "substantially the same" or made "non-substantive changes" to the statement that has been adjudicated defamatory.

But expanding the reach of an injunction in this way triggers the problem of overbreadth. Overbroad restrictions on speech are unconstitutional because of their potential to chill protected speech. *See Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 435 (Tex. 1998) ("An overbroad statute sweeps within its scope a wide range of both protected and non-protected expressive activity." (citation and internal quotation marks omitted)); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 237 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."). In the defamation context, the concern is that in prohibiting speech found to be

defamatory, the injunction unreasonably risks prohibiting nondefamatory speech as well. *See Lawson v. Murray*, 515 U.S. 1110, 1114 (1995) (Scalia, J., concurring in denial of writ of certiorari) ("The danger that speech-restricting injunctions may serve as a powerful means to suppress disfavored views is obvious enough even when they are based on a completed or impending violation of law.").

The particular difficulty in crafting a proper injunction against defamatory speech is rooted in the contextual nature of the tort. In evaluating whether a statement is defamatory, the court construes it "as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement." *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 655 (Tex. 1987). Given the inherently contextual nature of defamatory speech, even the most narrowly crafted of injunctions risks enjoining protected speech because the same statement made at a different time and in a different context may no longer be actionable. Untrue statements may later become true; unprivileged statements may later become privileged.

Kinney dismisses this concern, arguing that in such a scenario the defamer "could speak confident in the knowledge that [the enjoined statement is] no longer defamatory." But how confident could such a speaker be when he is bound by an injunction *not* to speak? The California Supreme Court suggested in *Balboa* that "[i]f such a change in circumstances occurs, [the] defendant may move the court to modify or dissolve the injunction." 156 P.3d at 353. We think it is no answer that a person must request the trial court's permission to speak truthfully in order to avoid being held in contempt. *See Pittsburgh Press*, 413 U.S. at 390 ("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker,

before an adequate determination that it is unprotected by the First Amendment."); *see also Balboa*, 156 P.3d at 357 (Kennard, J., dissenting) ("Requiring a citizen to obtain government permission before speaking truthfully is 'the essence of censorship' directly at odds with the 'chief purpose' of the constitutional guarantee of free speech to prevent prior restraints." (quoting *Near*, 283 U.S. at 713, and *Kingsley Books*, 354 U.S. at 445)).

These concerns apply even more forcefully to an injunction that goes beyond restraining verbatim recitations of defamatory statements and encompasses statements that are "substantially similar." Subtle differences in speech will obscure the lines of such an injunction and make it exceedingly difficult to determine whether a statement falls within its parameters. *Balboa*, 156 P.3d at 356 (Kennard, J., dissenting in part); *Oakley*, 879 F. Supp. 2d at 1091 (noting that "a 'similar statement' standard would require a court enforcing the injunction to continuously decide whether new statements by a persistent defendant were sufficiently similar"). For example, let us imagine a trial court enjoins a defendant from repeating the defamatory statement "John Smith sells handguns to minors," as well as similar statements. Can the defamer state more generally that Smith is engaged in the business of illegal gun sales or that Smith's business contributes to the nationwide problems with school shootings? Can the word "handgun" be changed to "shotgun"?[13]

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[13] The *Oakley* court proposed the following conundrum:

> If a court enjoined the word "thief," would related words like pilferer, looter, pillager, plunderer, poacher, and rustler also support the finding of willfulness necessary to hold the speaker in contempt? How about bandit? Pirate? What about phrases, e.g., "she was in the habit of converting other people's property to her own property?" Or further into abstraction, "she may take liberties with your property" or "count your silverware after she leaves your home?"

879 F. Supp. 2d at 1091.

These uncertainties highlight the inapplicability of the Supreme Court's obscenity cases. A permanent injunction restraining a theater owner from screening a film adjudicated to be obscene clearly applies only to that film, and others may be shown without the fear of contempt sanctions. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55–56 (1973) (upholding statute allowing civil injunction restraining exhibition of two films following adjudication that the films were obscene). *Pittsburgh Press*, while it involved commercial speech rather than obscenity, is similarly distinguishable. In that case, as noted above, the Supreme Court upheld an administrative order prohibiting a newspaper from continuing a practice of running gender-specific help-wanted ads pursuant to the enforcement of a local anti-discrimination law. 413 U.S. at 389–90. The Court stressed, however, that the order upheld could not be punished with contempt proceedings and "d[id] not endanger arguably protected speech" because it did not require speculation as to the effect of publication. *Id.* at 390 & n.14. As discussed above, this certainty does not translate to the defamation context, in which the task of crafting an effective injunction against future speech risks enjoining constitutionally protected speech to an unacceptable degree.

By contrast, no such concerns arise when courts issue speech-related injunctions that are not prior restraints, such as ordering the deletion of defamatory statements posted on a website. There is a legally cogent division between mandatory injunctions calling for the removal of speech that has been adjudicated defamatory and prohibitive injunctions disallowing its repetition. The latter impermissibly chills protected speech; the former does not. The distinction thus arms trial courts with an additional tool to protect defamed parties while ensuring the State does not infringe upon the fundamental right to free speech guaranteed by Article I, Section 8.

Accordingly, we hold that the Texas Constitution does not permit injunctions against future speech following an adjudication of defamation. Trial courts are simply not equipped to comport with the constitutional requirement not to chill protected speech in an attempt to effectively enjoin defamation. Instead, as discussed below, damages serve as the constitutionally permitted deterrent in defamation actions.

C. Damages Are Generally the Proper Remedy for Defamation

In keeping with Texas's longstanding refusal to allow injunctions in defamation cases, the well-settled remedy for defamation in Texas is an award of damages. *Ex parte Tucker*, 220 S.W. at 75–76; *Cullum*, 399 S.W.3d at 189; *Brammer*, 114 S.W.3d at 108. This can include economic damages like lost income, noneconomic damages like loss of reputation and mental anguish, and even punitive damages upon a finding of actual malice. *Hancock v. Variyam*, 400 S.W.3d 59, 65–66 (Tex. 2013). And imposition of damages has long been held to be an effective tool against defamers. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.").

Kinney raises the concern that a victim of defamatory speech by a judgment-proof, serial defamer can obtain no remedy in damages. Damages may not deter the serial defamer, either because she lacks the funds to pay the damages or because she has so much money that paying a series of fines is immaterial to her. It is also easy to imagine a scenario in which an award of damages, even if collectible, will not provide complete relief to the defamed plaintiff. Imagine a statement falsely accusing a person of pedophilia, for example. Presumably, an order prohibiting the statement from being repeated would be of paramount importance to the plaintiff. This scenario

was discussed at length in *Balboa*, the logic of which does not escape us. 156 P.3d at 351 ("Thus, a judgment for money damages will not always give the plaintiff effective relief from a continuing pattern of defamation."). However, the constitutional protections afforded Texas citizens are not tied to their financial status. *See, e.g.*, *id.* at 358 (Kennard, J., concurring) ("[N]either this nor any other court has ever held that a defendant's wealth can justify a prior restraint on the constitutional right to free speech."). As the Pennsylvania Supreme Court concluded in *Willing*, "[w]e cannot accept . . . that the exercise of the constitutional right to freely express one's opinion should be conditioned upon the economic status of the individual asserting that right." 393 A.2d at 1158. Yet, conditioning the allowance of prior restraints on a defendant's inability to pay a damage award would do just that.

Moreover, the concern that damages will not provide an effective remedy in defamation cases is not a new one, but we have never deemed it sufficient to justify a prior restraint. For example, in defamation *per se* cases, nominal damages, not injunctive relief, are awarded when actual damages are difficult to prove or are not claimed because "'the action is brought for the purpose of vindicating the plaintiff's character by a verdict of a jury that establishes the falsity of the defamatory matter.'" *Hancock*, 400 S.W.3d at 65 (quoting RESTATEMENT (SECOND) OF TORTS § 620 cmt. a (1977)). And the Supreme Court has expressly recognized that the potential inadequacy of damages as a remedy for defamation does not open the door to additional relief, stating: "The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22–23

(1990) (citation and internal quotation marks omitted). Applying the same reasoning, we too decline to open the door to prior restraints in this context.

D. The Advent of the Internet

Finally, we address Kinney's argument that the Internet is a game-changer with respect to the issue presented because it "enables someone to defame his target to a vast audience in a matter of seconds." The same characteristics that have cemented the Internet's status as the world's greatest platform for the free exchange of ideas, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)—the ease and speed by which any person can take on the role of the town crier or pamphleteer—have also ignited the calls for its receiving lesser protection. *See, e.g.*, Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 863–64 (Feb. 2000).

However, the Supreme Court has steadfastly refused to make free speech protections a moving target, holding that "[w]e must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 326 (2010). And, with respect to the advent of the Internet, the Court has gone further in championing its role as an equalizer of speech and a gateway to amplified political discourse, holding in *Reno* that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." 521 U.S. at 870. In this way, the Supreme Court has taken a definitive stance guaranteeing equal First Amendment protection for speech over the Internet. The Court has also recognized that damages, while "imperfect," are the remedy the law gives to defamation victims. *Milkovich*, 497 U.S. at 22–23

(citation and internal quotation marks omitted). We are not persuaded that the policy concerns that Kinney raises justify enjoining defamatory speech in a manner that substantially risks chilling constitutionally protected speech.

One final note is warranted in response to Kinney's assertion that the case for injunctive relief is made more compelling by the need to address the phenomena of cyber-bullying and online hate speech. It is enough to say that neither of those is at issue here. Today we simply continue to hold that "[d]efamation *alone* is not a sufficient justification for restraining an individual's right to speak freely." *Hajek*, 647 S.W.2d at 255 (emphasis added). But as discussed above, we have never held that all injunctions against future speech are *per se* unconstitutional, recognizing that they may be warranted to restrain speech that poses a threat of danger. *Id.* We need not and do not address the propriety of a requested injunction against speech that is not at issue, nor should we without analyzing the facts and circumstances underlying such a request.

III. Conclusion

In evaluating whether state action exceeds constitutional bounds governing freedom of speech, courts "must give the benefit of any doubt to protecting rather than stifling speech." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007). We hold that, while a permanent injunction requiring the removal of posted speech that has been adjudicated defamatory is not a prior restraint, an injunction prohibiting future speech based on that adjudication impermissibly threatens to sweep protected speech into its prohibition and is an unconstitutional infringement on Texans' free-speech rights under Article I, Section 8 of the Texas Constitution. Because the trial court concluded that no injunction of any kind would be permissible, the court erred

in granting summary judgment to the extent Kinney's requested injunction did not constitute a prior restraint. We therefore reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

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Debra H. Lehrmann
Justice

OPINION DELIVERED: August 29, 2014

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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Gutierrez Lupe		lgutierrez@cowlesthompson.com	5/12/2022 4:15:55 PM	SENT

Associated Case Party: Mark Maldonado

Name	BarNumber	Email	TimestampSubmitted	Status
Gracen Daniel	24116248	gracen.daniel@griffithbarbee.com	5/12/2022 4:15:55 PM	SENT
Julia Pendery		jpendery@cowlesthompson.com	5/12/2022 4:15:55 PM	SENT
George Mallers		tmallers@cowlesthompson.com	5/12/2022 4:15:55 PM	SENT
Claire James		cjames@cowlesthompson.com	5/12/2022 4:15:55 PM	SENT

Associated Case Party: Molly Wilkerson

Name	BarNumber	Email	TimestampSubmitted	Status
Molly LouiseWilkerson		missmolly2020@aol.com	5/12/2022 4:15:55 PM	SENT